Supreme Court, U.S.
FILED

No. _____

09-355 SEP 23 2009

OFFICE OF THE CLERK
William K. Suter, Clerk

In The
Supreme Court of the United States

MARK TREESH, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE KENTUCKY DEPARTMENT OF REVENUE, AND FRANKFORT INDEPENDENT SCHOOL DISTRICT, FRANKFORT, KENTUCKY,

Petitioners,

v.

DIRECTV, INC., AND ECHOSTAR SATELLITE, L.L.C.,

Respondents.

On Petition For Writ Of Certiorari To The Kentucky Supreme Court

PETITION FOR A WRIT OF CERTIORARI

DOUGLAS M. DOWELL, SR.*
BETHANY G. ATKINS
OFFICE OF LEGAL SERVICES FOR REVENUE
FINANCE AND ADMINISTRATION CABINET
COMMONWEALTH OF KENTUCKY
P.O. Box 423
Frankfort, Kentucky 40602-0423
(502) 564-9581

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a State statute mandating that school districts include the gross receipts of providers of direct satellite and wireless cable services ("DBS providers") in the tax base of a tax on the gross receipts of certain utility service providers that is administered and collected by the State and is utilized by the school districts to raise a portion of their guaranteed State funding as required under the State's system of funding its public schools is preempted by §602 of the Telecommunications Act of 1996. This federal law exempts a DBS provider from collecting and remitting any tax imposed by a local taxing jurisdiction, but preserves a State's authority to tax DBS providers and to distribute the revenue derived from the tax imposed and collected by a State to local jurisdictions.

PARTIES TO THE PROCEEDING

The Petitioners are Mark Treesh, in his official capacity as Commissioner of the Department of Revenue, Commonwealth of Kentucky, and the Frankfort Independent School District, Frankfort, Kentucky. The Respondents are DirecTV, Inc. and Echostar Satellite, L.L.C.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	10
I. THE DECISION OF THE KENTUCKY SUPREME COURT CONSTRUING §602 OF THE TELECOMMUNICATIONS ACT OF 1996 IS BLATANTLY CONTRARY TO THIS COURT'S LONGSTANDING PRECEDENTS AND CONGRESS'S EXPRESSED INTENT TO REFRAIN FROM INTERFERING WITH THE STATES' TAXING POWER IN THIS INSTANCE	11
II. TIIIS CASE PRESENTS A VITAL QUESTION OF NATIONAL IMPORTANCE BECAUSE THE JUDGMENT CREATES UNCERTAINTY AS TO THE LIMITATIONS PLACED UPON STATES' TAXING POWERS, ESPECIALLY FOR FUNDING THEIR PUBLIC SCHOOLS	22
CONCLUSION	37

TABLE OF CONTENTS – Continued

Page

APPENDIX

Opinion of the Kentucky Supreme Court.....App. 1-14

Opinion of the Kentucky Court of Appeals....App. 15-31

Opinion of the Franklin Circuit Court, Frankfort, Ky.....App. 32-40

Telecommunications Act of 1996, Sec. 602, 47 U.S.C. 152 note .....App. 41-42

Ky. Rev. Stat. §160.613 .....App. 43-44

Ky. Rev. Stat. §160.614 .....App. 45-47

TABLE OF AUTHORITIES

Page

CASES:

Abbott by Abbott v. Burke, 149 N.J. 145, 693 A.2d 417 (1997) 27

Belanger v. Madera Unified School District, 963 F.2d 248 (9th Cir. 1992) 18

Brigham v. State of Vermont, 166 Vt. 246, 692 A.2d 384 (1997) 27

Brown v. Board of Education of Topeka, Shawnee County, Kan., 347 U.S. 483 (1954), *supplemented*, 349 U.S. 294 (1955) 23, 34

Bullen v. Wisconsin, 240 U.S. 625 (1916) 35

California State Bd. of Equalization v. Sierra Summit, Inc., 490 U.S. 844 (1989) 11

Campbell County School Dist. v. State, 907 P.2d 1238 (Wyo. 1995) 27

Carpenter v. Shaw, 280 U.S. 363 (1930) 21

Cipollone v Liggett Group, Inc., 505 U.S. 504 (1992) 12, 15, 21, 23

Claremont School District v. Governor, 142 N.H. 462, 703 A.2d 1353 (1997) 27

Columbia Falls Elem. School Dist. No. 6 v. State, 326 Mont. 304, 109 P.3d 257 (2005) 27

CSX Transportation, Inc. v. Easterwood, 507 U.S. 658 (1993) 23

TABLE OF AUTHORITIES – Continued

Page

Delroph v. State, 78 Ohio St. 3d 193, 677 N.E.2d 733 (1997) 27

Dows v. Chicago, 78 U.S. 108 (1871).....13

Edgewood Ind. School Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989).....27

Florida Department of Revenue v. Picadilly Cafeterias, Inc., 128 S.Ct. 2326 (2008)..... 11, 12, 21, 36

Horne v. Flores, 129 S.Ct. 2579 (2009) 33

Hull v. Roosevelt Elem. School Dist. No. 66, 192 Ariz. 34, 960 P.2d 634 (1998).....27

John Hancock Mut. Life Ins. Co. of Boston, Mass. v. Pink, 276 N.Y. 421, 12 N.E.2d 529 (N.Y. 1938).....19

Lakeview School Dist. No. 25 of Phillips Co. v. Huckabee, 349 Ark. 116, 76 S.W.3d 250 (2002).....27

Lamar v. Board of Education of Hancock County School District, 467 S.W.2d 143 (Ky. 1971).....18

Lewis v. Board of Education of Talbot County, 262 F.Supp.2d 608 (D.Md.2003).....18

Maryland v. Louisiana, 451 U.S. 725 (1981).....15

Matthews v. Rodgers, 284 U.S. 521 (1932) 21

McDuffy v. Secretary of Executive Office of Education, 415 Mass. 545, 615 N.E.2d 516 (1993).....27

Medtronic Inc. v. Lohr, 518 U.S. 470 (1996).....12

TABLE OF AUTHORITIES – Continued

Page

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) 18

Missouri v. Jenkins, 515 U.S. 70 (1995) 23, 35

National Private Truck Council, Inc. v. Oklahoma Tax Commission, 515 U.S. 582 (1995) 13, 21

Neeley v. West-Orange Cove Consol. School Dist., 176 S.W.3d 746 (Tex. 2005) 28

Oklahoma Tax Commission v. U.S., 319 U.S. 598 (1943) 11

Opinion of Justices, 623 So.2d 107 (Ala. 1993) 27

Reconstruction Finance Corp. v. Beaver County, 328 U.S. 204 (1946) 14, 18

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 23

Rose v. Council for a Better Education, Inc., 790 S.W.2d 186 (Ky. 1989) 4, 19, 27, 28

Roswell v. LaSalle National Bank, 450 U.S. 503 (1981) 35

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) 25, 26, 32, 33, 35

Schwindel v. Mead County, Ky., 113 S.W.3d 159 (Ky. 2003) 18

Seattle School Dist. No. 1 of King County v. State, 90 Wash. 2d 476, 585 P.2d 71 (1978) 27

Serrano v. Priest, 18 Cal.3d 728, 557 P.2d 929 (1976) 27

TABLE OF AUTHORITIES – Continued

Page

Sheff v. O'Neill, 238 Conn. 1, 678 A.2d 1267 (1996) 27

State ex rel. Board of Education for County of Randolph v. Bailey, 192 W.Va. 534, 453 S.E.2d 368 (1994) 27

Superior Oil Co. v. State of Mississippi, 280 U.S. 390 (1930) 35

Tennessee Small School Systems v. McWherter, 851 S.W.2d 139 (Tenn. 1993) 27

United States v. Allegheny County, 322 U.S. 174 (1944) 21

United States v. Wells Fargo Bank, 485 U.S. 351 (1988) 11

United States Trust Co. v. Helvering, 307 U.S. 57 (1939) 12

Wardair Canada Inc. v. Florida Department of Revenue, 477 U.S. 1 (1986) 14

CONSTITUTIONAL PROVISIONS, STATUTES, AND LEGISLATIVE HISTORY:

U.S. Const. Art. VI, cl. 2 ..... 2, 11

Ky. Const. §29 17

Ky. Const. §183 4

28 U.S.C. §1257(a) 1

Telecommunications Act of 1996 §602, 47 U.S.C. §152 note ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Telecommunications Act of 1996 §602(a), 47 U.S.C. §152 note ..... *passim*

Telecommunications Act of 1996 §602(b)(3), 47 U.S.C. §152 note 3, 18

Telecommunications Act of 1996 §602(c), 47 U.S.C. §152 note 3, 13, 14, 15, 34

1990 Ky. Acts, ch. 476, §93 ..... 4, 29, 31

1990 Ky. Acts, ch. 476, Pt. III, §115 5

2005 Ky. Acts, ch. 168, §130 17

Ky. Rev. Stat. Ann. §131.030(1) 17

Ky. Rev. Stat. Ann. §131.110 7

Ky. Rev. Stat. Ann. §157.360 20

Ky. Rev. Stat. Ann. §160.455 8

Ky. Rev. Stat. Ann. §160.470(9)(a) 3, 19, 20

Ky. Rev. Stat. Ann. §160.613 ..... 2, 4, 8

Ky. Rev. Stat. Ann. §160.613(1) 5, 20

Ky. Rev. Stat. Ann. §160.6131 ..... 4, 5

Ky. Rev. Stat. Ann. §160.614 ..... *passim*

Ky. Rev. Stat. Ann. §160.614(3) 5, 8, 9, 17

Ky. Rev. Stat. Ann. §160.614(5) 20

Ky. Rev. Stat. Ann. §160.6145 ..... 6, 8

Ky. Rev. Stat. Ann. §160.6145(1) 7

Ky. Rev. Stat. Ann. §160.615 ..... 6, 16

Ky. Rev. Stat. Ann. §160.6152 9

TABLE OF AUTHORITIES – Continued

Page

Ky. Rev. Stat. Ann. §160.6154 .....5, 8, 16

Ky. Rev. Stat. Ann. §160.6154(1).....7, 17

Ky. Rev. Stat. Ann. §160.6154(3).....7

Ky. Rev. Stat. Ann. §160.6156 .....7, 8, 16

Ky. Rev. Stat. Ann. §160.617 9

142 Cong. Rec. H1145-06, H1158 (Feb. 1, 1996) 16, 35

OTHER AUTHORITIES:

http://www.directv.com/DTVAPP/content/directv/what_is_directv 22

http://www.dishnetwork.com/about/profile.....22

David Hurst et al., *Overview and Inventory of State Education Reforms: 1990 to 2000,* NCES 2003-020 at 32, U.S. Dept. of Education, National Center for Education Statistics, Washington DC 2003, *available at* http://nces.ed.gov/pubs2003/2003020.pdf.....*passim*

Meira Schulman Ferziger, *Validity of Public School Funding Systems*, 110 A.L.R. 5th 293, §2 (originally published in 2003).....24

Robert Ward Shaw, Comment, *The States, Balanced Budgets, and Fundamental Shifts in Federalism*, 82 N.C.L.Rev. 1195 (2004).....22

PETITION FOR A WRIT OF CERTIORARI

Mark Treesh, in his official capacity as Commissioner of the Department of Revenue, Commonwealth of Kentucky, and Frankfort Independent School District, Frankfort, Kentucky respectfully petition this Court for a writ of certiorari to review the opinion and judgment rendered by the Kentucky Supreme Court on June 25, 2009.

OPINIONS BELOW

The opinion of the Kentucky Supreme Court is not yet reported and is reprinted at Pet. App. 1-14. The opinion of the Kentucky Court of Appeals that was reversed by the Kentucky Supreme Court is unreported and is reprinted at Pet. App. 15-31. The order of the Franklin Circuit Court that was reversed by the Kentucky Court of Appeals is also unreported and is reprinted at Pet. App. 32-40.

STATEMENT OF JURISDICTION

The judgment of the Kentucky Supreme Court was rendered on June 25, 2009. Pet. App. 1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, cl. 2 of the United States Constitution provides "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . "

The federal law at issue – Telecommunications Act of 1996, Sec. 602, reprinted at 47 U.S.C. §152 note – is reproduced at Pet. App. 41-42.

The relevant Kentucky statutory provisions – Ky. Rev. Stat. Ann. §§160.613 and 160.614 – are reproduced at Pet. App. 43-47.

STATEMENT OF THE CASE

There are no genuine issues of material fact in dispute in this matter. The issue in this case is whether §602 of the Telecommunications Act of 1996 ("§602") pre-empts Ky. Rev. Stat. Ann. §160.614 as it applies to providers of direct satellite and wireless cable services ("DBS providers").

Section 602(a) of the federal law provides:

> Preemption. A provider of direct-to-home satellite service shall be exempt from the collection or remittance, or both, of any tax or fee imposed by any local taxing jurisdiction on direct-to-home satellite service.

The term "local taxing jurisdiction" is defined in §602(b)(3) as

> any municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other local jurisdiction in the territorial jurisdiction of the United States with the authority to impose a tax or fee, but does not include a State.

Section 602(c) expressly preserves a State's authority to tax DBS providers and distribute the revenue:

> Preservation of State Authority. This section shall not be construed to prevent taxation of a provider of direct-to-home satellite service by a State or to prevent a local taxing jurisdiction from receiving revenue derived from a tax or fee imposed and collected by a State.

The effect of this provision is to preempt taxes on DBS providers that are imposed, administered, and collected by local taxing jurisdictions. A tax imposed by the State and distributed to local jurisdictions is expressly exempt from preemption.

A Kentucky school district's board of education is required to raise a portion of the guaranteed funds to support education in Kentucky. Ky. Rev. Stat. Ann. §160.470(9)(a). A board of education accomplishes this task through the levy of property taxes and/or any of three permissive taxes, one of which is a school utility gross receipts license tax ("the School Tax"), which will be described below. *Id.*

This is a result of a Kentucky Supreme Court decision holding that Kentucky's then current system of common schools did not comply with the requirement under Kentucky Constitution §183 to provide an efficient system of common schools throughout the State, given the "overall inadequacy" of the education system when compared to national and adjacent States' standards, the "great disparity in educational opportunities," and "great disparity and inadequacy of financial effort, throughout the State." *Rose v. Council for a Better Education, Inc.*, 790 S.W.2d 186, 213 (Ky. 1989). In 1990, the Kentucky General Assembly completely restructured the system of funding education in Kentucky by enacting the Fund to Support Education Excellence in Kentucky ("SEEK"). 1990 Ky. Acts, ch. 476, §93 (codified at Ky. Rev. Stat. Ann. §§157.310 through 157.440). When enacting these provisions, the General Assembly stated its intent "to assure substantially equal public school opportunities for those in attendance in the public schools of the Commonwealth, but not to limit nor to prevent any school district from providing educational services and facilities beyond those assured by the state supported program." 1990 Ky. Acts, ch. 476, §93 (codified at Ky. Rev. Stat. Ann. §157.310).

The School Tax is authorized by Ky. Rev. Stat. Ann. §160.613 and is based on gross receipts derived from the furnishing of utility services which consist of communications services, electric power, water, and natural, artificial, and mixed gas. Ky. Rev. Stat. Ann.

§160.6131. In 1990, the Kentucky General Assembly enacted Ky. Rev. Stat. Ann. §160.614 to extend the School Tax to add cable service in addition to the gross receipts derived from utility services. 1990 Ky. Acts, ch. 476, Pt. III, §115.

State law limits the rate of the School Tax. It may not exceed three percent (3%) of the providers' gross receipts. Ky. Rev. Stat. Ann. §160.613(1). In 2005, the General Assembly amended Ky. Rev. Stat. Ann. §160.614 to include the gross receipts derived from the furnishing of direct satellite broadcast and wireless cable service ("DBS services"). The amendment is codified at Ky. Rev. Stat. Ann. §160.614(3) and provides:

> [a] utility gross receipts license tax initially levied by a school district board of education on or after July 1, 2005, shall include the gross receipts derived from the furnishing of direct satellite broadcast and wireless cable service in addition to the gross receipts derived from the furnishing of utility services defined in KRS 160.6131 and cable service.

Pet. App. 44.

Prior to the 2005 amendment, in an effort to streamline both auditing and collection procedures, and to generate additional revenue for the State by increasing compliance, the Kentucky General Assembly transferred the collection and administration of the School Tax from the school districts to Kentucky's Department of Revenue. Ky. Rev. Stat.

Ann. §160.6154. Effective July 1, 2005, all providers of utility, cable, or DBS services in Kentucky were required to register with the Department of Revenue through its website established for administration of the tax. Ky. Rev. Stat. Ann. §160.6145; http://revenue.ky.gov/business/utilschool.htm. Persons subject to the tax obtain just one registration and file one return on a monthly or other periodic basis on the Department's website. Ky. Rev. Stat. Ann. §160.615; http://revenue.ky.gov/business/utilschool.htm (follow red school house icon hyperlink in upper right hand corner).

A service provider logs on to the Department of Revenue's website using a User ID number, and enters gross receipts by school district on the online tax return. http://revenue.ky.gov/business/utilschool.htm (follow red school house icon hyperlink). Once the DBS provider enters receipts, the online system automatically calculates the tax for each school district according to the established rate.

Service providers may view the school district and rate information for a specific address through tax roll information supplied by the Property Valuation Administrator in each county and made available on a web server linked to the Department of Revenue's website. *Id.* (available after log on). A DBS provider need only type in the specific address and county of a subscriber and the system will furnish the name of the correct school district. *Id.* The Department of Revenue's website also provides maps that present the geographical boundaries of Kentucky's school districts. *Id.* (follow red school

house icon hyperlink; then school district maps hyperlink – expand map to regular size by clicking on bottom right corner of map).

The online system provides an E-pay system for making electronic payments. Ky. Rev. Stat. Ann. §160.6145(1). It also provides an alternative method of filing geared to larger companies, whereby a DBS provider may submit data, rather than completing the online tax return. http://revenue.ky.gov/business/utilschool.htm ("Web filing is a method for larger companies to submit their return data directly to [the] D[epartment] O[f] R[evenue] in a specified file format rather than completing the online tax return.").

The Department of Revenue performs the audits and handles any disputes. Any dispute is resolved by the procedure governing other State taxes. Ky. Rev. Stat. Ann. §§160.6154(1), (3); 131.110. Any request by a provider for a refund for overpayments of the tax is also handled by the Department. Ky. Rev. Stat. Ann. §160.6156.

Appellants, DirecTV, Inc. ("DirecTV"), and Echostar Satellite, L.L.C. ("Echostar"), are providers of DBS services, yet failed to register, file, or submit any payments of the School Tax. They brought this action on November 22, 2005, to obtain injunctive relief and a declaration that the recent amendment to Ky. Rev. Stat. Ann. §160.614 to include DBS providers as subject to the School Tax is preempted by §602 of the Telecommunications Act of 1996.

The Department of Revenue assessed DirecTV and Echostar for the months of July through November, 2005. For this five month period, the estimated tax liability for DirecTV ranged from $645,957.65 to $764,480.61 per month, and for Echostar ranged from $659,595.63 to $712,717.72 per month, excluding interest and penalties.

The Franklin Circuit Court ultimately ruled that the School Tax "is preempted by §602 of the Federal Communications Act of 1996 insofar as it applies to DBS service providers." Pet. App. 39. The Kentucky Court of Appeals reversed the decision of the circuit court, and directed that DirecTV and Echostar remit the School Tax, including interest and penalties. Pet. App. 27. In the Opinion, the majority held:

> [T]he "savings clause" in subsection (c) in § 602 contemplates a school tax scenario as prescribed in KRS 160.614(3). The Commonwealth mandates the local school district levy an *ad valorem* tax to obtain the amount of money needed as shown in the general school budget. KRS 160.455. The maximum rate of 3% is prescribed by statute. KRS 160.613. Gross receipts license tax returns and related payments shall be transmitted electronically to the Department of Revenue. KRS 160.6145. The Department of Revenue then distributes the taxes collected to each school district imposing the tax. KRS 160.6154. Finally, the Department of Revenue makes amortized refunds to service providers. KRS 160.6156.

> While not explicitly stated in the pre-emption section, the reason for prohibiting the local jurisdictions from taxing DBS providers revolved around the burden of calculating and paying multiple tax bills with various due dates in any given state.
>
> The current taxing scheme is not overly burdensome to DBS service providers. The district school superintendent must provide the necessary information to the service provider and Department of Revenue to help determine the geographic location of the subscriber. KRS 160.6152. Any DBS or wireless cable service provider required to pay the utility tax may increase its rates up to 3% to cover the cost of the tax. KRS 160.617. Most importantly, the DBS providers are required to only pay one assessment each quarter.
>
> For the foregoing reasons, it is readily apparent that the tax authorized by the legislation here being attacked (KRS 160.614(3)) is for state purpose. Therefore, the provision of the Telecommunications Act which preserves the right of a state to tax the services of a DBS provider allows for the taxation scheme outlined in KRS 160.614(3).

Pet. App. 26-27.

DirecTV and Echostar sought discretionary review by the Kentucky Supreme Court, which was granted. Reversing the opinion of the Court of Appeals, the Supreme Court held that Ky. Rev. Stat.

Ann. §160.614 "fall[s] squarely within the scope of Section 602(a)." Pet. App. 11. It was therefore preempted by federal law, although the court agreed that Congress's purpose for enacting the federal law was only to eliminate administrative burdens on DBS providers, not to free them from taxation. Pet. App. 10.

REASONS FOR GRANTING THE WRIT

The Kentucky Supreme Court's construction and application of §602 of the Telecommunications Act of 1996 conflicts with longstanding precedents established by this Court and is contrary to Congress's expressed intent in this instance to refrain from interfering with the States' taxing power. The decision presents a question of national importance asking whether Congress's purpose was to interfere with the States' ability to administer their own fiscal operations, especially with respect to the funding of their public schools.

The sole and controlling issue is a federal issue; that is, it is an issue arising under the United States Constitution and it involves the interpretation of a federal statute. There is no presence of an adequate nonfederal ground for sustaining the State court's judgment.

I. THE DECISION OF THE KENTUCKY SUPREME COURT CONSTRUING §602 OF THE TELECOMMUNICATIONS ACT OF 1996 IS BLATANTLY CONTRARY TO THIS COURT'S LONGSTANDING PRECEDENTS AND CONGRESS'S EXPRESSED INTENT TO REFRAIN FROM INTERFERING WITH THE STATES' TAXING POWER IN THIS INSTANCE.

Relying on the Supremacy Clause, the Kentucky Supreme Court construed §602 of the Telecommunications Act of 1996 ("§602") as preempting a Kentucky statute, Ky. Rev. Stat. Ann. §160.614, as it applies to DBS providers. Pet. App. 41-42; 45-47. In its reasoning, the Kentucky court failed to recognize and consider the controlling substantive canon of statutory construction "that courts should proceed carefully when asked to recognize an exemption from taxation that Congress has not clearly expressed[,]" contrary to this Court's longstanding precedent most recently articulated in *Florida Department of Revenue v. Picadilly Cafeterias, Inc.*, 128 S.Ct. 2326, 2337, 2338 (June 16, 2008) (quoting *California State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 851-852 (1989) ("We agree with Florida that the federalism canon articulated in *Sierra Summit* and elsewhere obliges us to construe [11 U.S.C.A.] §1146(a)'s exemption narrowly.") (internal quotation omitted); *see also*, *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988) ("[E]xemptions from taxation . . . must be unambiguously proved."); *Oklahoma Tax Commission v. U.S.*, 319 U.S. 598, 607

(1943) ("This Court has repeatedly said that tax exemptions are not granted by implication.") (quoting *United States Trust Co. v. Helvering*, 307 U.S. 57, 60 (1939)). Questions concerning the scope of the intended preemption of a State's taxing statute "support a narrow interpretation" of the express preemptive language in the federal statute, rather than the broad interpretation given §602 by the Kentucky court. *Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 523 (1992)); *Picadilly*, 128 S.Ct. at 2338.

Although the Kentucky court does not dispute that §602 only exempts taxation by a "local taxing jurisdiction," the judgment fails to address and overrule the Department's position that it is Ky. Rev. Stat. Ann. §160.614, the State statute mandating the inclusion of providers of direct satellite and wireless cable services ("DBS providers") in the tax base, not local ordinances, that imposes the tax. This failure to consider a more narrow interpretation that would construe a State's statute mandating that school districts include DBS providers in the tax base to raise revenue for public schools blatantly conflicts with this Court's holding in *Picadilly* that the federalism canon "that discourages federal interference with the administration of a State's taxation scheme[ ]" is predominate when construing the scope of the intended preemption of a State's taxing statute. *Picadilly*, 128 S.Ct. at 2337.

This is especially egregious because unlike the federal statute at issue in *Picadilly*, here Congress

expressly stated in §602(c) its intention to refrain from federal interference with the States' taxing laws:

> This section shall not be construed to prevent taxation of a provider of direct-to-home satellite service by a State or to prevent a local taxing jurisdiction from receiving revenue derived from a tax or fee imposed and collected by a State.

Such an aberration from this Court's longstanding precedent when Congress clearly intended to protect the States' ability to control their own fiscal operations raises important questions concerning the principle of comity between federal and state governments. *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 515 U.S. 582, 586 (1995) ("Congress and this Court repeatedly have shown an aversion to federal interference with state tax administration."). As this Court stated long ago,

> It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.

Dows v. Chicago, 78 U.S. 108, 110 (1871).

This is not an example of an instance to infer a pervasiveness of federal interest in a federal regulatory scheme where Congress intended to occupy the field by requiring a uniform tax, or the

elimination of a tax altogether on DBS providers. *See, e.g., Wardair Canada Inc. v. Florida Department of Revenue*, 477 U.S. 1, 6-7 (1986) (The Federal Aviation Act detailing those State taxes which are permitted, and those taxes which are prohibited, does not indicate Congress's intent to "occupy the field," but, to the contrary, it "shows [] that, to the degree that Congress considered the power of States to tax air travel, it expressly and unequivocally permitted the States to exercise that authority."). In other words, rather than prohibiting State taxation of DBS providers, "Congress invited it" as is apparent by the express language found in §602(c) authorizing States to tax DBS providers and distribute the revenue to local municipalities. *Id.* at 7.

Moreover, in light of the express provision in §602(c) permitting taxation by the States, "the assumption that Congress intends to have its law to have the same consequences throughout the nation cannot be made." *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204, 206, 209 (1946) (a federal Act prohibiting States from imposing taxes on the Reconstruction Finance Corporation or its subsidiaries, but providing that "any real property of these governmental agencies shall be subject to State . . . taxation to the same extent according to its value as other real property is taxed" meant Congress did not intend nationwide uniformity as to tax consequences). By the savings clause of §602(c), Congress clearly expressed its intent not to free DBS providers

from taxation or to impose uniform tax consequences in each State.

Nor does the text of §602 reflect a Congressional intent that all local municipalities share in the proceeds of the State-imposed tax, or that the State tax apply uniformly throughout the State to all DBS service areas within the State's borders. Rather, §602(a) only prohibits taxation by "any local taxing jurisdiction," and §602(c) contains no provision requiring that all local taxing jurisdictions "receiv[e] revenue" derived from a tax imposed by the State on DBS providers.

"Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). "Accordingly, the purpose of Congress is the ultimate touchstone of pre-emption analysis." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quotations and citations omitted).

Representative Hyde, Chairman of the House Committee on the Judiciary, stressed the purpose of the exemption provision:

> [t]o permit thousands of local taxing jurisdictions to tax such a national service would create an unnecessary and undue burden on the providers of such [DBS] services. Local taxing jurisdictions are therefore preempted from taxing the provision or sale of direct-to-home satellite services.

> Direct-to-home satellite service providers and others in the distribution chain are exempted from collecting and remitting local taxes and fees on the sale of such services. The power of the States to tax this service is not affected by section 602. Again, States may, if they wish, share the revenue thus collected with their local municipalities.

142 Cong. Rec. H1145-06, H1158 (Feb. 1, 1996), 1996 WL 39800 (Cong. Rec.). Thus, the purpose, as expressed in §602(a) and by Rep. Hyde, is to eliminate the undue burden of the "collection or remittance, or both, of any tax or fee" to "thousands" of local jurisdictions. This evil Congress feared is not presented by the School Tax.

The central administration of the School Tax by the Kentucky Department of Revenue provides a quick and easy method for all providers of utility, cable or DBS services to remit the tax, dispute an assessment, or request a refund. Ky. Rev. Stat. Ann. §§160.615; 160.6154; 160.6156. The Department of Revenue then takes on the task of distributing the tax collected to the school districts. Ky. Rev. Stat. Ann. §160.6154.

Filing a single tax return, and remitting a single tax to the State of Kentucky does not interfere with the congressional policy objective to eliminate the burden on DBS providers of collecting and remitting taxes to "thousands of local taxing jurisdictions." The administrative nightmare presented by the differing ordinances of local jurisdictions that Congress feared

is not present here. The School tax imposed by Ky. Rev. Stat. Ann. §160.614(3) does not require DBS providers to submit a multitude of different tax returns, subject to various filing due dates, as well as varying filing places that would be necessary when taxes are imposed and collected by local jurisdictions.

A DBS provider is only exempt from a tax "imposed by" a local taxing jurisdiction. Congress makes it clear that taxes imposed and collected by a State are allowed. The law imposing the School Tax is admittedly a State law; the State statute, Ky. Rev. Stat. Ann. §160.614, was enacted by Kentucky's General Assembly. 2005 Ky. Acts, ch. 168, §130. The General Assembly is "vested in a House of Representatives and a Senate, which, together, shall be styled the 'General Assembly of the Commonwealth of Kentucky'." Ky. Const. §29. The school districts are simply sharing in the revenues produced by this State-imposed tax.

Kentucky's Department of Revenue is the State agency "exercising all administrative functions . . . of the state revenue and tax laws . . . " Ky. Rev. Stat. Ann. §131.030(1). It has "all the powers, rights, duties, and authority with respect to the collection, refund, and administration" of the School Tax. Ky. Rev. Stat. Ann. §160.6154(1). The taxation of DBS providers is not subject to local variance. There are not a multitude of local ordinances DBS providers must comprehend, nor different types of tax returns, with various filing deadlines, nor a vast array of rules for challenging assessments.

Furthermore, §602(b) does not include a school district in the definition of a "local taxing jurisdiction". This is evidence that Congress intended to respect a State's characterization of its school taxes as State, not local taxes, and recognized that school taxes would necessarily be imposed by a State.[1] *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43-44 (1989) ("[T]he cases in which we have found that Congress intended a state-law definition of a statutory term have often been those where uniformity clearly was not intended."); *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204, 209-210 (1946) (applying Pennsylvania's definition of "real property" to determine the preemptive scope of a federal act on a taxing statute because Congress did not intend uniform tax consequences among the States).

In Kentucky, as in other states, public education is a vital function of state government, and a board of education is not a local government, but an agency of state government, as discussed below in Part II.[2]

---

[1] *See, e.g., Lamar v. Board of Education of Hancock County School District*, 467 S.W.2d 143, 146 (Ky. 1971) ("School taxes are classified as state and not local taxes.").

[2] *Schwindel v. Mead County, Ky.*, 113 S.W.3d 159, 168 (Ky. 2003) ("[A] board of education is not a local government, but an agency of state government."); *see also, Belanger v. Madera Unified School District*, 963 F.2d 248, 254 (9th Cir. 1992) (A school district is an agent of the state that performs state governmental functions.); *Lewis v. Board of Education of Talbot County*, 262 F.Supp.2d 608, 614 (D.Md.2003) (County school boards of Maryland are instrumentalities of the state, not a

(Continued on following page)

"[T]he sole responsibility for providing a system of common schools lies with the [Kentucky] General Assembly." *Rose v. Council for a Better Education, Inc.*, 790 S.W.2d 186, 216 (Ky. 1989). Like a majority of the States, the Kentucky General Assembly requires school districts' boards of education to raise a portion of the guaranteed funds to support education in Kentucky. Ky. Rev. Stat. Ann. §160.470(9)(a). In enacting Ky. Rev. Stat. Ann. §160.614 mandating that the school districts include the gross receipts of DBS providers in the tax base, the Kentucky General Assembly expanded the tax base to increase revenue to meet its needs for funding its public schools.

The School Tax is imposed by the State, even though this is accomplished by piggybacking on a tax put in place by the school districts' boards of education. Assuming for the sake of argument that a school district is a "local taxing jurisdiction," when a tax is levied through a local ordinance that is adopted by virtue of a State enabling act, the source of the imposition of the tax is the State statute, not the local ordinance, when the enabling act passed by the State legislature is for a state purpose. *See, e.g., John Hancock Mut. Life Ins. Co. of Boston, Mass. v. Pink*, 276 N.Y. 421, 12 N.E.2d 529, 531 (N.Y. 1938) (the source of the imposition of an excise tax levied through a local law was the State because the

---

branch of the county government nor an agency under its control.).

enabling statute passed by the legislature was for the state purpose of funding measures concerning public health and welfare). Kentucky authorizes school districts to adopt the School Tax to raise a portion of the guaranteed State funding, as required under the State's system of financing its public education, as described more particularly below in Part II. Ky. Rev. Stat. Ann. §§160.470(9)(a); 157.360; 160.613(1).

Likewise, an increase or decrease in the tax rate is a function of the State's requirement that boards of education raise a portion of the guaranteed State funding, and therefore is non-discretionary and a means to determine the distribution of the revenue collected by the Department of Revenue. Furthermore, although the General Assembly permitted a board of education to elect to opt out of the tax, this election had to occur prior to the date the levy of the tax on DBS providers became effective. Ky. Rev. Stat. Ann. §160.614(5). Once the School tax imposed by Ky. Rev. Stat. Ann. §160.614 became effective, a board of education no longer had the authority to exclude DBS providers from the tax base.

The Kentucky Supreme Court's judgment casts a wide net of preemption, regardless that Kentucky's administration, collection, and distribution of the tax eliminates the mischief no one disputes was Congress's purpose for enacting the exemption provision – to relieve DBS providers of an undue administrative burden of "the collection or remittance, or both, of any tax or fee" to "thousands" of local jurisdictions; *not* to free DBS providers from taxation

itself. This erroneous approach is counter to this Court's longstanding recognition that "the purpose of Congress is the ultimate touchstone of pre-emption analysis[,]" *Cipollone*, 505 U.S. at 516, that courts must have a "scrupulous regard for the rightful independence of state governments . . . and a proper reluctance to interfere [ ] with their fiscal operations . . . in every case where the asserted federal right may be preserved without it[,]" *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 515 U.S. 582, 589 (1995) (citing *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932)), and that courts must adhere to the rule that what must be considered is "the real nature of the tax and its effect upon the federal right asserted[.]" *United States v. Allegheny County*, 322 U.S. 174, 184 (1944) (quoting *Carpenter v. Shaw*, 280 U.S. 363, 367-368 (1930)).

The Kentucky Supreme Court's reasoning invalidating Kentucky's taxing statute as preempted by §602 of the Telecommunications Act of 1996 directly conflicts with this Court's longstanding precedent articulated in *Picadilly* that the federalism canon discouraging federal interference with the administration of a State's taxing statutes requires a narrow interpretation when determining the scope of a federally allowed exemption from State taxation. The scope of the exemption from taxation allowed by §602 is of national importance and should be addressed by this Court now because the judgment rendered by the Kentucky court creates uncertainty in all the States as to the limitations placed upon

their freedom to create taxing programs to best suit their needs, especially for funding their public education systems.

II. THIS CASE PRESENTS A VITAL QUESTION OF NATIONAL IMPORTANCE BECAUSE THE JUDGMENT CREATES UNCERTAINTY AS TO THE LIMITATIONS PLACED UPON STATES' TAXING POWERS, ESPECIALLY FOR FUNDING THEIR PUBLIC SCHOOLS.

DBS providers of direct-to-home satellite services have a national presence throughout the fifty states. http://www.directv.com/DTVAPP/content/directv/what_is_directv; http://www.dishnetwork.com/about/profile. How the States may tax DBS providers in light of §602 is a matter of national importance as they struggle to find sources of revenue to account for increasing shortfalls in their annual budgets during the current economic times, especially as States struggle to fund their public schools. "State budgets throughout the United States have come under unprecedented pressure. In recent years state coffers have gone from flush to dry, and the prevalence of balanced budget requirements in state constitutions and statutes has turned revenue shortfalls into a national crisis." Robert Ward Shaw, Comment, *The States, Balanced Budgets, and Fundamental Shifts in Federalism*, 82 N.C.L.Rev. 1195, 1195-96 (2004). An exemption from taxation such as that presented by §602 affects the States' administration of their own

fiscal operations, including the funding of their public schools. It is a classic example of a federal act pertaining to an important subject traditionally occupied and governed by State law, and illustrates why this Court counsels that "pre-emption will not lie unless it is the clear and manifest purpose of Congress" in such instances. *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 663-664 (1993); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Cipollone*, 505 U.S. at 516; *id.*, at 532-533 (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part).

This Court has declared that the education of children is "perhaps the most important function of state and local governments." *Brown v. Board of Education of Topeka, Shawnee County, Kan.*, 347 U.S. 483, 493 (1954), *supplemented*, 349 U.S. 294 (1955); *see also, Missouri v. Jenkins*, 515 U.S. 70, 131 (1995). Although public schools are funded through a mix of local, state, and federal funds, the latest published statistics from the United States Department of Education's National Center for Education Statistics show that 48.7% of revenues for elementary and secondary education came from the States, 41.7% from local governments, and only 7.1% from the federal government. David Hurst et al., *Overview and Inventory of State Education Reforms: 1990 to 2000*, NCES 2003-020 at 32, U.S. Dept. of Education, National Center for Education Statistics, Washington DC 2003 [hereinafter, *National Center for Education*

Statistics Report], *available at* http://nces.ed.gov/pubs 2003/2003020.pdf. Therefore, the States' funding of their public schools illustrates the kind of important traditional State concern that is the underpinnings of this Court's reluctance to interfere with, and presumption, against displacement of States' laws in a field traditionally occupied and governed by the States themselves unless it is the "clear and manifest purpose of Congress." A look at methods used by States to fund public education is helpful to understand the importance of clarifying the exemption provision provided in §602.

State governments play a critical role in school financing systems. The details regarding the manner in which the State should finance public education is generally determined by each individual State legislature and general assembly. Meira Schulman Ferziger, *Validity of Public School Funding Systems*, 110 A.L.R. 5th 293, §2 (2003). Most State constitutions contain clauses that require the State to provide a statewide system of education. *Id.* "State efforts to strengthen their revenue systems – by making them more balanced, stable, efficient and fair – have a direct impact on the availability, stability, and level of funds available for education." *National Center for Education Statistics Report* at 33.

Kentucky's reliance on local as well as State resources for funding public education is comparable to the systems employed by virtually every other State. Indeed, all of the States recognize "the vital element of local participation" in their statewide

educational programs. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 48 (1973). While the States themselves invest considerable State funds and assure an educational opportunity for every child, States also "permit[ ] and encourage a large measure of participation in and control of each district's schools at the local level." *Id.* at 49. In *San Antonio Independent School District*, this Court further stated:

> "The history of education since the industrial revolution shows a continual struggle between two forces: the desire by members of society to have educational opportunity for all children, and the desire of each family to provide the best education it can afford for its own children." (J. Coleman, *forward to* G. Strayer & R. Haig, The Financing of Education of the State of New York (1923)).
>
> The [ ] [States'] system of school finance is responsive to these two forces. While assuring a basis education for every child in the State, it permits and encourages a large measure of participation in and control of each district's schools at the local level. . . . The merit of local control was recognized last Term in both the majority and dissenting opinions in Wright v. Council of the City of Emporia, 407 U.S. 451, 92 S.Ct. 2196, 33 L.Ed. 51 (1972). Mr. Justice Stewart stated there that "(d)irect control over decisions vitally affecting education of one's children is a need that is strongly felt in our society."

> Id., at 469, 92 S.Ct., at 2206. The Chief Justice, in his dissent, agreed that "(l)ocal control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well." Id., at 478, 92 S.Ct., at 2211.
>
> The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters. In part, local control means, as Professor Coleman suggests, the freedom to devote more money to the education of one's children. Equally important, however, is the opportunity it offers in the decision-making process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence. . . . No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.

Id. at 49-50.

During the 1990s, States implemented a number of reforms that affect the way they raise revenue for public education, allocate funds among districts, and allow funds to be used. *National Center for Education Statistics Report* at 38. One major cause for the reforms was due to court challenges to public school funding systems based on a State's educational

obligation as set forth in that State's constitution. *Id.* at 40. Many State courts found the State education finance systems failed to live up to their constitutional mandates to deliver an acceptable level of education services. *Id.* States were charged with restructuring revenue arrangements to provide a more "efficient" or "adequate" system of funding. *Id.* at 41.[3]

State responses to court rulings that the State's education funding system was unconstitutional varied considerably, reflecting not only the differences in court directives, but also different State political climates. *Id.* at 47. Although some States have

---

[3] *See, e.g., Opinion of Justices*, 623 So.2d 107 (Ala. 1993); *Hull v. Roosevelt Elem. School Dist. No. 66*, 192 Ariz. 34, 960 P.2d 634 (1998); *Lakeview School Dist. No. 25 of Phillips Co. v. Huckabee*, 349 Ark. 116, 76 S.W.3d 250 (2002); *Serrano v. Priest*, 18 Cal.3d 728, 557 P.2d 929 (1976); *Sheff v. O'Neill*, 238 Conn. 1, 678 A.2d 1267 (1996); *Rose v. Council for a Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989); *McDuffy v. Secretary of Executive Office of Education*, 415 Mass. 545, 615 N.E.2d 516 (1993); *Columbia Falls Elem. School Dist. No. 6 v. State*, 326 Mont. 304, 109 P.3d 257 (2005); *Claremont School District v. Governor*, 142 N.H. 462, 703 A.2d 1353 (1997); *Abbott by Abbott v. Burke*, 149 N.J. 145, 693 A.2d 417 (1997); *Delroph v. State*, 78 Ohio St. 3d 193, 677 N.E.2d 733 (1997); *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139 (Tenn. 1993); *Edgewood Ind. School Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Brigham v. State of Vermont*, 166 Vt. 246, 692 A.2d 384 (1997); *Seattle School Dist. No. 1 of King County v. State*, 90 Wash. 2d 476, 585 P.2d 71 (1978); *State ex rel. Board of Education for County of Randolph v. Bailey*, 192 W.Va. 534, 453 S.E.2d 368 (1994); *Campbell County School Dist. v. State*, 907 P.2d 1238 (Wyo. 1995).

succeeded in crafting a remedy to satisfy the courts' directives, many States have experienced less success. *Id.* For example, some reformed systems that relied heavily on increased property tax levies brought taxpayer opposition. *Id.* For example, in Texas, the State's Supreme Court held that increased property taxes amounted to an unconstitutional State- imposition because the Texas Constitution forbids a State imposed property tax.[4] *Neeley v. West-Orange Cove Consol. School Dist.*, 176 S.W.3d 746, 795 (Tex. 2005).

Kentucky undertook the most comprehensive overhaul, restructuring the State's finance system as well as other key components of its education system. *National Center for Education Statistics Report* at 47. This was done in response to the declaration of the Kentucky Supreme Court that the entire State education system was unconstitutional. *Rose v. Council for a Better Education, Inc.*, 790 S.W.2d at 213.

The Kentucky Education Reform Act (KERA), enacted within the year, recreated the entire education system and included finance, governance, and program changes. *National Center for Education*

---

[4] The Texas Constitution provides, "No State ad valorem taxes shall be levied upon any property within this State." Tex. Const. Art. VII, §1-e. An ad valorem tax is a tax levied on the owner of the property (esp. real property), usually based on the property's value. A property tax is a tax imposed proportionally on the value of something (esp. real property). Blacks Law Dictionary (8th ed. 2004).

Statistics Report at 44. The General Assembly stated its intent "to assure substantially equal public school opportunities for those in attendance in the public schools of the Commonwealth, but not to limit nor to prevent any school district from providing educational services and facilities beyond those assured by the state supported program." 1990 Ky. Acts, ch. 476, §93 (codified at Ky. Rev. Stat. Ann. §157.310). Current expenditures per student increased thirty-two percent between 1990 and 1999 in Kentucky. *National Center for Education Statistics Report* at 44.

General revenue reforms make up a second category of major education reforms that began in the 1990s and continue to this day. *National Center for Education Statistics Report* at 51. These State efforts often broaden the revenue base for a particular tax, shift the balance among tax sources, or alter the mix of state and local revenues which fund schools. *Id.* During the late 1990s, many States cut taxes reflecting strong State economies. *Id.* Also, many states shifted away from local property taxes, upon which they had traditionally relied to fund schools, due to public discontent with both funding disparities among "property rich" and "property poor" school districts, and high local property tax rates. *Id.* As a result, State policy makers were left grappling for alternative mechanisms for funding education. *Id.* at 52-53.

All but one State uses an educational funding arrangement that requires a local effort. *Id.* at 35-36.[5] For example, a majority of states use a "foundation" funding program. *Id.* at 36. Foundation programs take into account both a district's educational needs and its ability to pay. *Id.* States guarantee districts or local governments a minimum level of funds for each student. *Id.* In return, they set a minimum spending level and a uniform qualifying tax rate for all districts in the state. *Id.* Foundation aid to any district is the difference between the determined minimum spending level and the revenues generated by applying the qualifying tax rate against the district's tax base. *Id.*

A second program, called a "guaranteed tax base" or "guaranteed tax yield" program promotes equity by guaranteeing that school districts have equal ability to raise revenues, despite the differences in their tax bases. *Id.* Guaranteed tax base programs allow districts the ability to generate revenues as if they had a state-specified tax base and guaranteed tax yield programs (also known as district power equalizing programs), guaranteeing that districts will generate a given revenue for a specified tax rate. *Id.*

Some States, including Kentucky, combine features of different funding formulas to create a

---

[5] Hawaii is the only state that provides full funding for education. *National Center for Education Statistics Report* at 36 ("While this option provides a very equitable distribution of resources, it eliminates the ability of local voters to express preferences for different funding levels of education[.]").

tiered funding structure. *Id.* These plans are designed to promote adequacy and equity by combining components of foundation programs and other programs. *Id.* Typically, they will set a minimum foundation level ("tier one"), to ensure that minimum resources are provided to meet educational needs. *Id.* A second tier ("tier two"), for aid provides funds through guaranteed tax base or tax yield programs to promote fiscal equality. *Id.*

Kentucky's method of funding education provides a good illustration. Kentucky has taken into account what revenue sources are available to meet the educational needs of each school district. Property tax alone is insufficient in property-poor school districts. Therefore, Kentucky has adopted a system of funding using a property tax, supplemented by a broad based utility gross receipts tax, the School Tax at issue.

This system of funding Kentucky's public schools allows flexibility by authorizing school districts to adopt funding that best serves their need to raise the required tier one funding, and allows them another resource to raise tier two funding. The two tiers of funding allow Kentucky to meet its goal in educational reform, "to assure substantially equal public school opportunities for those in attendance in the public schools of the Commonwealth, but not to limit nor to prevent any school district from providing educational services and facilities beyond those assured by the state supported program[.]" as stated in the preamble to the Kentucky Education Reform Act. of 1990, Ky. Acts, ch. 476, §93 (codified at Ky. Rev. Stat. Ann. §157.310). And this comports with the

consensus of the States, and this Court that, "[n]o area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education." *San Antonio Independent School District*, 411 U.S. at 50.

Thus, it is important for States to know how they may tax DBS providers as their legislatures seek ways to best fund their public schools to meet or maintain State constitutional standards, especially because property values are decreasing. Not only does the old traditional method of using property taxes only to fund public schools lead to disparity between "property rich" and "property poor" districts, but it also is not a viable option in current economic times. The decision by the Kentucky court invalidating Ky. Rev. Stat. Ann. §160.614 will create considerable uncertainty for a significant number of States in the critical area of funding public education during a time when States' legislatures are searching for alternative ways to combat compelling fiscal challenges.

Uncertainty on the part of State legislatures as to how to structure school funding mechanisms to include that "vital element of local participation" when imposing a centrally administered tax on DBS providers will result in an undesirable trend away from local support of public schools. Local participation where education is concerned is "vital" to "encourage a large measure and participation in . . . each district's schools at the local level[,]" and it provides the opportunity for local communities to determine how best to utilize their tax dollars "to provide the best education [] [they] can afford for [] [their] own children." *San Antonio Independent School District*,

411 U.S. at 49-50. It is important for this Court to intervene now to clarify the scope of the exemption allowed by §602 because States cannot afford a wait and see approach – a court challenge takes years to wind its way through the court system and States need the money now! Furthermore, disagreement as to the scope the exemption from taxation allowed by §602 will lead to conflicting decisions among courts.

When discussing the State of Arizona's failure to adequately fund its public school system recently, this Court stated: "Congress' judgment [is] that the best way to raise the level of education nationwide is by granting state and local officials flexibility to develop and implement educational programs that address local needs, while holding them accountable for the results." *Horne v. Flores*, 129 S.Ct. 2579, 2602 (2009). If the decision of the Kentucky court is allowed to stand, States will not be able to meet their constitutional standards of adequacy and demands of increased costs amidst decreasing revenue projections without compromising and restructuring their public school funding programs by eliminating "the vital element of local participation" when expanding a tax base to include DBS providers. *San Antonio Independent School District v. Rodriguez*, 411 U.S. at 49.

Therefore, a clarification of the scope of the exemption provision of §602 by this Court is ripe to instruct the States regarding the limitations placed upon their legislatures in enacting laws to fund public education. If allowed to stand, the judgment will have a chilling effect on fostering the "vital element of local participation" necessary for States to

create and maintain excellent education programs, which Congress surely did not intend. *Id.* The potential ramifications of the decision below therefore threatens the essential and "perhaps the most important function of state and local governments[ ]" – to provide the best education it can afford for its own children. *Brown v. Board of Education of Topeka, Shawnee County, Kan.*, 347 U.S. at 493. Swift intervention by this Court is critical to restore the carefully crafted balance between State and federal law struck by Congress when enacting §602 of the Telecommunications Act of 1996. It is vital that this Court decide the significant preemption issue presented by this case that will undoubtedly effect the funding of education in virtually all the States.

It is readily apparent for the reasons stated above that the preemption provision at issue does not preempt the Kentucky State statute. The express language in §602(a) must be reconciled with §602(c), preserving a State's authority to tax providers of DBS services. Congress omitted a school district from its definition of "local taxing jurisdiction" because it recognized that taxes for funding public schools would necessarily be imposed by the State. A tax on DBS providers such as the one imposed by Ky. Rev. Stat. Ann. §160.614 broadens the tax base to increase much needed revenue for State funding of public education, while allowing school districts to participate by determining how best to raise the required portion of their guaranteed State funding in their own communities. Central administration and collection of the tax by the State prevents the mischief envisioned by Congress when enacting §602(a) – DBS

providers collecting and remitting taxes to "thousands of local taxing jurisdictions." 142 Cong. Rec. H1145-06, H1158 (Feb. 1, 1996), 1996 WL 39800 (Cong. Rec.).

"[T]he very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it." *Superior Oil Co. v. State of Mississippi*, 280 U.S. 390, 395-396 (1930) (citing *Bullen v. Wisconsin*, 240 U.S. 625, 630 (1916)). States must not be penalized for structuring tax laws for the funding of their public schools that happen to reach, but not overstep, the boundaries of §602. This Court has long recognized "that education is primarily a concern of local authorities" *Missouri v. Jenkins*, 515 U.S. at 131, and that the very complexity of the problems of financing a statewide public school system "counsels against [] [unwarranted] interference with the informed judgment made at the state and local levels." *San Antonio Independent School District*, 411 U.S. at 42.

The States' mechanisms used to fund their public schools is a classic example illustrating the kind of traditional State concern that buttresses a narrow interpretation of the exemption from taxation allowed by §602(a). "[T]he imperative need of a State to administer its own fiscal operations" raises an important question of comity under the principles of federalism clearly contemplated by Congress when enacting §602. *Roswell v. LaSalle National Bank*, 450 U.S. 503, 522 (1981). The judgment of the court below failed to recognize and consider the controlling

substantive canon of statutory construction "that courts should proceed carefully when asked to recognize an exemption from taxation that Congress has not clearly expressed[,]" contrary to this Court's longstanding precedent most recently articulated in *Picadilly*, 128 S.Ct. at 2336-2337. The judgment creates uncertainty as to the limitations Congress has placed upon the States' taxing powers by §602 at a time when States cannot afford to wait on the lengthy process required when a law is challenged. Disagreement as to the scope of §602(a) will most certainly lead to conflicting court decisions. Therefore, the scope of the exemption from taxation allowed by §602(a) is a vital question of national importance that must be decided by this Court to eliminate uncertainty and to clarify that Congress intended no federal interference with a State statute imposing a tax on DBS providers that is collected by the State and centrally administered so that none of the administrative burdens presented by differing ordinances, tax returns, filing deadlines, and filing locations of local jurisdictions that Congress feared are present. If the scope of the tax exemption is not clarified by this Court, the judgment below will lead to damaging consequences on the ability of the States to control their own fiscal operations, especially for funding their public schools.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DOUGLAS M. DOWELL, SR.*
BETHANY G. ATKINS
OFFICE OF LEGAL SERVICES FOR REVENUE
FINANCE AND ADMINISTRATION CABINET
COMMONWEALTH OF KENTUCKY
P.O. Box 423
Frankfort, Kentucky 40602-0423
(502) 564-9581

**Counsel of Record*

CORRECTED: SEPTEMBER 14, 2009
RENDERED: JUNE 25, 2009
TO BE PUBLISHED

Supreme Court of Kentucky
2007-SC-000714-DG

DIRECTV, INC. AND ECHOSTAR SATELLITE, LLC — APPELLANTS

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2006-CA-001983-MR
FRANKLIN CIRCUIT COURT NO. 05-CI-01623

MARK TREESH, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF REVENUE AND FRANKFORT INDEPENDENT SCHOOL DISTRICT — APPELLEES

OPINION OF THE COURT
BY JUSTICE ABRAMSON

REVERSING

Kentucky Revised Statute (KRS) 160.613 authorizes local district boards of education to levy "a utility gross receipts license tax for schools" on the gross receipts derived from furnishing utility services within the district. In 2005, the General Assembly enacted House Bill 272, which in part expanded the gross receipts tax base to include "gross receipts derived from the furnishing of direct satellite broadcast

and wireless cable service." KRS 160.614(3). Soon after this new provision went into effect, Appellants DirecTV, Inc. and Echostar Satellite, L.L.C., the multi-channel television industry's two largest suppliers of direct broadcast satellite (DBS) services (the DBS providers), brought suit in Franklin Circuit Court seeking a declaration that as applied to them the gross receipts tax was preempted by the federal Telecommunications Act of 1996, a provision of which bars local taxation of DBS programming services. They also sought an injunction barring the Department of Revenue (the Department) from enforcing the tax against them. By order entered August 22, 2006, the Circuit Court granted summary judgment in favor of the DBS providers and awarded the relief they sought. A divided panel of the Court of Appeals reversed. The majority ruled that because the gross receipts tax was levied to fund schools it was in effect a state tax and thus was not preempted by federal law. We accepted the DBS providers' motion for discretionary review to consider the preemptive scope of the applicable provision of the Telecommunications Act of 1996 and now reverse.

RELEVANT FACTS

The General Assembly has expanded the tax base for the utility gross receipts license tax on two occasions. In 1990, the General Assembly amended the tax to include a levy "on the gross receipts derived from the furnishing of cable service in addition to the gross receipts derived from the furnishing of the utility services defined in KRS 160.6131." KRS

160.614(1).[1] Then, as noted, in 2005 the General Assembly authorized a levy on the "gross receipts derived from the furnishing of direct satellite broadcast and wireless cable service in addition to the gross receipts derived from the furnishing of utility services defined in KRS 160.6131 and cable service." KRS 160.614(3).[2] The individual school districts decide at what rate to tax the cable and satellite providers, provided that rate does not exceed 3% of gross receipts, and may opt not to tax them at all. KRS 160.613, 160.614(4). The local school districts must, however, treat the two types of provider the same way. KRS 160.614(4)-(5). Cable and satellite providers are thus obliged to determine their tax liability on a district-by-district basis, and are required to remit the total to the Department every month. KRS 160.615.

While the Kentucky General Assembly was responding to the evolution of multi-channel video programming with these changes to the school tax provisions, Congress was addressing the same programming evolution in other ways. With the

---

[1] "Cable service" is defined in KRS 136.602(1) as "the provision of video, audio, or other programming service to purchasers."

[2] "Satellite broadcast" is defined as a point-to-point distribution service, wherein "programming or voice [is] transmitted or broadcast by satellite, microwave, or any other equipment directly to the purchaser," KRS 136.602(19).

Telecommunications Act of 1996 (the 1996 Telecommunications Act), Congress extensively amended the original 1934 Telecommunications Act, stating that its intent was "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. 104-104 (preamble). Clearly aware of satellite broadcasters' emerging role as competitors of cable providers in the multi-channel video programming market, Congress enacted Section 602(a) of the 1996 Act which provides: "Preemption. A provider of direct-to-home satellite service shall be exempt from the collection or remittance, or both, of any tax or fee imposed by any local taxing jurisdiction on direct-to-home satellite service." Pub. L. No. 104-104, Title VI, § 602(a) (reprinted at 47 U.S.C. § 152, historical and statutory notes). The DBS providers maintain that the gross receipts license tax is a local tax imposed in violation of Section 602(a), a tax to which they should not be subjected.

In ruling to the contrary, the Court of Appeals' majority relied on Section 602(c) of the 1996 Telecommunications Act, a savings clause which provides that "[t]his section shall not be construed to prevent taxation of a provider of direct-to-home satellite service by a State or to prevent a local taxing jurisdiction from receiving revenue derived from a tax or fee imposed and collected by a State." According to the Court of Appeals' majority, the gross receipts license

tax is in effect a state tax and thus is saved from preemption by this latter provision. Although school taxes in Kentucky are indeed deemed state taxes for a variety of state purposes, we agree with the DBS providers that for the purposes of the 1996 Telecommunications Act, the gross receipts tax, as presently administered, must be deemed the sort of local imposition which Section 602(a) was intended to preempt.

ANALYSIS

As the parties and the courts below all correctly note, under the Supremacy Clause of the United States Constitution (Article VI Clause 2), a state law that interferes with or is contrary to federal law is "without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (citation and internal quotation marks omitted). This federal preemption of state law is generally understood as occurring in any one of three overlapping ways. Congress may expressly declare its intention to displace state law or it may imply that intention by so thoroughly occupying a legislative field as to leave no room for the States to develop their own rules. *Id.* The intent to preempt is also understood when the state law actually conflicts with federal law. *Id.* Where, as in this case, Congress has expressly declared its intention to preempt an area of state law, a reviewing court's task is reduced to determining the scope of that intended preemption. As the United States Supreme Court has explained,

> the purpose of Congress is the ultimate touchstone in every pre-emption case. . . . As a result, any understanding of the scope of a pre-emption statute must rest primarily on a fair understanding of *congressional purpose*. . . . Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it. . . . Also relevant, however, is the structure and purpose of the statute as a whole, . . . as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.

Medtronic, Inc. v. Lohr, 518 U.S. 470, 485-86 (1996) (internal quotation marks omitted). Thus, "congressional purpose" is paramount and a reviewing court must consider not only the language of the statute but also the statute's legislative history, an important indicator of Congress's intent. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

Beginning with the language of Section 602(a), Congress preempted "any tax or fee imposed by any local taxing jurisdiction." A "local taxing jurisdiction" is defined to include "any municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other local jurisdiction in the territorial jurisdiction of the United States with the authority to impose a tax or fee, but does not include a State." Section 602(b)(3). It is undisputed

that the gross receipts license taxes at issue are imposed by approximately 140 of Kentucky's 170 local school districts; that each district may set the applicable tax rate, with the rates varying from district to district; and that a given district may exempt cable and satellite programming providers from the tax altogether if it so decides.

Despite the apparent local characteristics of the taxes, the Department and the Court of Appeals maintain that Kentucky's historical stance regarding the "state" nature of school taxes, *City of Louisville v. Board of Education of City of Louisville*, 154 Ky. 316, 157 S.W. 379, 380 (1913), saves them from preemption. While we do not disagree with the characterization of Kentucky precedent on school taxes, we are compelled to reject the contention that it saves the gross receipt taxes from preemption because the application of federal law is not "dependent on state law." *N.L.R.B. v. Natural Gas Utility Dist.*, 402 U.S. 600 (1971). *See, e.g. Montgomery v. Huntington Bank*, 346 F.3d 693, 699 (6th Cir. 2003) ("State law . . . cannot be our reference point. Rather, to give proper meaning to a federal statute we must be guided by the plain meaning of the statute, canons of statutory construction, relevant legislative history, and other *indicia* that shed light on the statute's meaning.") Thus Kentucky's particular view of school taxes is not a, much less the, determining factor in our preemption analysis. Moreover, the particular savings clause for state taxes in the 1996 Telecommunications Act, entitled "Preservation of State Authority," saves

only those taxes or fees "imposed and collected by a State." Section 602(c). While the Department, an agent of the Commonwealth, collects the taxes for the various districts, it is undisputed that the taxes are actually imposed on a district-by-district, and not a statewide, basis. In short, when the challenged gross receipts taxes are evaluated in light of the language employed by Congress, they appear to be expressly preempted.

Our conclusion is buttressed by reference to the legislative history of Section 602 of the 1996 Telecommunications Act. Specifically, we may discern Congress's purpose in allowing State taxation of DBS services while preempting local taxation by considering the Conference Committee Report and the explanatory comments of one of the bill's sponsors. The Senate version of the 1996 Telecommunications Act did not contain Section 602's preemption provisions. The House version did. In adopting the House version, the Conference Committee explained that

> [t]he conference agreement adopts the House provisions with modifications. This section exempts DTH [direct-to-home] satellite service providers from collecting and remitting local taxes and fees on DTH satellite services. DTH satellite service is programming delivered directly to subscribers equipped with satellite receivers at their premises; it does not require the use of public rights-of-way or the physical facilities or services of a community. The conferees adopt

> the House language, but narrow the language to ensure that the exemption is only provided for the actual sale of the programming delivered by the direct-to-home satellite service. . . . The intent of these amendments is to clarify that the exemption applies only to the programming provided by the direct-to-home satellite service. To give two illustrative examples, the exemption does not apply to the sale of equipment; . . . In addition, the exemption does not apply to real estate taxes that are otherwise applicable when the provider owns or leases real estate in a jurisdiction. Also, States are free to tax the sale of the service and they may rebate some or all of those monies to localities if they so desire.

H.R. Conf. Rep. 104-458, 201-02 (1996).

Recommending the Conference version on the floor of the House, Congressman Hyde, one of the bill's sponsors, further explained that

> Section 602 reflects a legislative determination that the provision of direct-to-home satellite service is national, not local in nature. Unlike cable and telephone companies which utilize public rights-of-way to provide service to their subscribers, providers of direct-to-home services utilize satellites to provide programming to their subscribers in every jurisdiction. To permit thousands of local taxing jurisdictions to tax such a national service would create an unnecessary and undue burden on the

> providers of such services. Local taxing jurisdictions are therefor preempted from taxing the provision or sale of direct-to-home satellite services. Direct-to-home satellite service providers and others in the distribution chain are exempted from collecting and remitting local taxes and fees on the sale of such services. The power of the States to tax this service is not affected by section 602. Again, States may, if they wish, share the revenue thus collected with their local municipalities.

142 Cong. Rec. H1145-06, H1158 (1996).

Given these comments and the 1996 Telecommunication Act's general aim of encouraging efficient, competitive telecommunications markets, it is apparent that Congress's intent with Section 602 was not to spare the DBS providers from taxation as such, but to spare national businesses with little impact on local resources from the administrative costs and burdens of local taxation in the myriad local jurisdictions where their services would be sold.[3] Compliance with an enormous hodgepodge of local taxes would impose administrative costs, which, in Congress's view, were undue, since satellite providers, unlike cable and

---

[3] Notably, there is no prohibition on the local school districts benefiting from taxes levied by the Commonwealth and then distributed to the districts. Section 602(c), quoted *supra*, expressly allows for local taxing districts "receiving revenue derived from a tax or fee imposed and collected by a State."

telephone companies, do not depend on local rights-of-way or a community's "physical facilities or services." Whether we (or our General Assembly for that matter) would concur with this distinction is irrelevant because Congress's stated purpose is both apparent and controlling.

Viewed in light of Section 602's legislative history, Kentucky's gross receipts license tax entails precisely the locality-by-locality administrative burdens Congress intended to preempt. DBS providers are required to calculate their taxes separately for each school district in the state, with potentially 170 districts imposing varying tax rates. It matters not, as the Department and Amicus, Time Warner Cable, Inc., argue, that the Department provides access to computer software meant to minimize that burden, for Congress has determined that the burden may not be imposed at all.

CONCLUSION

In sum, Section 602(a) of the Telecommunications Act of 1996 preempts local taxation of direct-to-home broadcast satellite programming. The gross receipt taxes which various local school district boards of education impose on satellite programming providers pursuant to KRS 160.614 are local taxes which carry precisely the sort of administrative burdens the federal law was intended to avoid. Falling squarely within the scope of Section 602(a), the taxes are preempted by federal law. Accordingly, we reverse the

Opinion of the Court of Appeals and thereby reinstate the Judgment of the Franklin Circuit Court.

All sitting. All concur.

COUNSEL FOR APPELLANTS:

Kenneth Sidney Handmaker
Bradley E. Cunningham
Middleton Reutlinger
2500 Brown & Williamson Tower
Louisville, KY 40202

E. Joshua Rosenkranz
Jeremy N. Kudon
Orrick, Herrington & Sutcliffe, LLP
666 Fifth Ave.
New York, NY 10103

Pantelis Michalopoulos
Steptoe & Johnson LLP
1330 Connecticut Ave., NW
Washington, DC 20036

Eric Shapland
Randy J. Kozel
Heller Ehrman LLP
Times Square Tower
7 Times Square
New York, NY 10036-6524

COUNSEL FOR APPELLEES:

Bethany G. Atkins
Office of Legal Services for Revenue
P.O. Box 423
Frankfort, KY 40602-0423

COUNSEL FOR AMICUS CURIAE
TIME WARNER CABLE, INC.:

Jackson W. White
Stoll Kennon Ogden PLLC
300 West Vine St., Suite 2100
Lexington, KY 40507-1801

Eric S. Tresh
Sutherland Asbill & Brennan, LLP
999 Peachtree Street, N.E.
Atlanta, GA 30309-3996

Supreme Court of Kentucky

2007-SC-000714-DG

DIRECTV, INC. AND ECHOSTAR SATELLITE, LLC — APPELLANTS

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2006-CA-001983-MR
FRANKLIN CIRCUIT COURT NO. 05-CI-01623

MARK TREESH, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF REVENUE AND FRANKFORT INDEPENDENT SCHOOL DISTRICT — APPELLEES

ORDER OF CORRECTION

The Opinion of the Court by Justice Abramson rendered June 25, 2009, is corrected on its face by substitution of the attached pages 1 and 10 in lieu of pages 1 and 10 of the original opinion. Said correction does not affect the holding of the original Opinion rendered by the Court.

Entered: September 14, 2009.

/s/ John D. Minton, Jr.
CHIEF JUSTICE

RENDERED: SEPTEMBER 7, 2007; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001983-MR

MARK TREESH, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF REVENUE; FRANKFORT INDEPENDENT SCHOOL DISTRICT — APPELLANTS

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE THOMAS WINGATE, JUDGE
ACTION NO. 05-CI-01623

DIRECTV, INC.; ECHOSTAR SATELLITE, L.L.C. — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: THOMPSON AND WINE, JUDGES; HENRY,[1] SENIOR JUDGE. WINE, JUDGE: Mark Treesh, in his official capacity as Commissioner of the Department of Revenue, and the Frankfort Independent School District appeal an order of the Franklin Circuit Court granting motions for

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

summary judgment filed by DIRECTV, Inc., and EchoStar Satellite, L.L.C. At issue is whether the gross receipts of providers of direct satellite broadcast and wireless cable service ("DBS") are subject to taxation by local school districts pursuant to KRS 160.614(3). The trial court held § 602 of the Telecommunications Act of 1996[2] preempts KRS 160.614(3) as it applies to DBS providers. After our review of the record and briefs of each of the parties (including an *amicus curiae* brief filed by Time Warner Cable, Inc.), as well as oral arguments, we reverse and remand with directions.

The facts are not in dispute. In 2005, KRS 160.614 was amended to include the gross receipts derived from the furnishing of DBS and wireless cable service. The amendment provides:

> (3) A utility gross receipts license tax initially levied by a school district board of education on or about July 1, 2005, shall include the gross receipts derived from the furnishing of direct satellite broadcast and wireless cable service in addition to the gross receipts derived from the furnishing of utility services defined in KRS 160.6131 and cable service.

---

[2] Pub. L. 104, Title VI, § 602 of the Federal Telecommunications Act of 1996. 47 U.S.C.A. § 152.

Each board of education of a school district decides whether to "opt out" or to impose the utility tax according to the procedure set out in KRS 160.614(5). The Kentucky legislature transferred the collection and administration of the tax from the school districts to the Kentucky Department of Revenue. KRS 160.6145.

All providers of cable, utility and DBS services are required to register with the Department of Revenue and may utilize a website to file monthly tax returns. The website also identifies the school districts, geographic boundaries and tax rate information which can be utilized by the service providers. The site also acknowledges that the Department of Revenue collects the tax based on the rate established by the local authority. Finally, the superintendent of each school district is to provide the Department of Revenue and each utility provider the boundaries of the district where the utility service is provided. KRS 160.6152.

The Appellees, DIRECTV, Inc., and EchoStar Satellite, L.L.C., which are DBS service providers, have failed to register because they believe they are exempt from paying the utility tax, relying on § 602 of the Federal Telecommunications Act of 1996, which states in part:

> (a) Preemption – A provider of direct-to-home satellite service shall be exempt from the collection or remittance, or both, of any tax or fee imposed by any local taxing

jurisdiction on direct-to-home satellite service.

(b) Definitions –

. . . .

(3) Local taxing jurisdiction. – The term "local taxing jurisdiction" means any municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other local jurisdiction in the territorial jurisdiction of the United States with the authority to impose a tax or fee, but does not include a State.

. . . .

(c) Preservation of State Authority – This section shall not be construed to prevent taxation of a provider of direct-to-home satellite service by a State or to prevent a local taxing jurisdiction from receiving revenue derived from a tax or fee imposed and collected by a State.

The parties filed cross-summary judgment motions, with the Appellants seeking imposition of the tax on providers and the Appellees seeking injunctive relief, as well as a declaration that § 602 preempted enforcement of KRS 160.614(3).

The Franklin Circuit Court held that the utility tax is preempted by § 602 of the Telecommunications Act insofar as it applies to DBS service providers. The

Appellants now appeal the court's August 22, 2006, order granting summary judgment and permanently enjoining the Department of Revenue from requiring the Appellees to comply with KRS 160.614(3) as it applies to DBS service providers.

The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky.App. 1996), *citing* Kentucky Rules of Civil Procedure (CR) 56.03. "The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor." *Lewis v. B & R Corp.,* 56 S.W.3d 432, 436 (Ky.App. 2001), *citing Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480-82 (Ky. 1991). "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo.*" *Lewis, supra.* A reviewing court is not bound by the trial court's decision on questions of law. In the present case, the questions to be answered dealt with the interpretation of statutes. "The construction and application of statutes is a matter of

law and may be reviewed *de novo*." *Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth, Transportation Cabinet*, 983 S.W.2d 488, 490 (Ky. 1998).

In 1990, the Kentucky General Assembly, in response to the Supreme Court's directive in *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989), enacted an Education Reform Act which revised both state and local school taxing structures. KRS 160.470, which is among the statutes the Act amended, establishes a minimum base funding level, a portion of which is to be raised by local school districts with the levy of a minimum equivalent tax of thirty cents per $100.00 of assessed valuation. KRS 160.470(9)(a). The local effort may be composed of an *ad valorem* property tax, or the special taxes – occupational license tax, utility gross receipts license tax or excise tax – authorized by KRS 160.593 *et seq.*, or a combination of these taxes.

The Kentucky Supreme Court held in *Williams v. Kentucky Department of Education*, 113 S.W.3d 145, 152 (Ky. 2003):

> As we have previously emphasized, the *sole responsibility* for providing the system of common schools lies with the General Assembly. If they choose to delegate any of this duty to institutions such as the local boards of education, the General Assembly must provide a mechanism to assure that the ultimate control remains with the General Assembly, and assure that those local school

> districts also exercise the delegated duties in an efficient manner. [*Rose, supra,* at 216.]

This, of course, as *Williams* noted, was not a novel notion. "[P]ublic education has long been recognized as a function of State government. . . ." *Board of Education of Louisville v. Society of Alumni of Louisville Male High School, Inc.*, 239 S.W.2d 931, 933 (Ky. 1951), and "every common school in the state . . . is a state institution. . . ." *City of Louisville v. Board of Education of City of Louisville,* 154 Ky. 316, 157 S.W. 379, 380 (1913).

The Court further held:

> We have several times written, in substance and effect, that every common school in the state, whether it be located in a populous city or in a sparsely settled rural district, is a state institution, protected, controlled, and regulated by the state, and that the fact that the state has appointed agencies such as fiscal courts, school trustees, and municipal bodies to aid it in the collection of taxes for the maintenance of these schools does not deprive them of their state character. . . . Therefore, when a municipal body, or a county, or a school district, levies taxes for school purposes, the tax so levied is a state, and not a municipal, county, or district, tax, although it be levied and collected by municipal or county or district officers.

City of Louisville v. Board of Education of City of Louisville, supra (internal citations omitted).

In *Board of Education of Louisville v. Board of Education of Jefferson County*, 458 S.W.2d 6, 8 (Ky. 1970), the former Court of Appeals declared that boards of education were not municipal corporations. Specifically, the Court held:

> [T]hough a school district possesses some of the attributes of a municipal corporation for some legal purposes as was recognized in *Sims v. Board of Education of Jefferson County, Ky.*, 290 S.W.2d 491 [(1956)], and though a school district is regarded as a political subdivision for some legal considerations as pointed out in *Board of Education of City of Corbin v. City of Corbin*, 301 Ky. 686, 192 S.W.2d 951 [(1946)], a school district is, nevertheless, an agency of the state subject to the will of the legislature and existing for one public purpose only – to locally administer the common schools within a particular area subject to the paramount interest of the state.

"Thus viewed, the statutory relationship between the DOE and the local board was more akin to that of principal-agent than to that of co-agents." *Williams v. Department of Education, supra,* at 154.

In *Rose, supra,* at 201, the Court acknowledged that local school districts were creatures of the state and that "our General Assembly has given local districts a perpetual, corporate existence, and has in two statutes [KRS 160.160 and 160.290], specifically given local boards virtual unlimited authority to carry out their duty of promoting local education."

Again and again Kentucky's Courts have ruled that the local district boards of education and the taxes they assessed were a state concern.

In *Cullinan v. Jefferson County*, 418 S.W.2d 407 (Ky. 1967), the Court held, "A board of education in Kentucky is performing a function of the state in operating the public schools as state institutions." *Commonwealth v. Louisville National Bank*, 220 Ky. 89, 294 S.W. 815 (1927) (School taxes are classified as state and not local taxes); *Middleton v. Middleton*, 239 Ky. 759, 40 S.W.2d 31.1 (1931) (Members of county boards of education are state and not municipal officers); *Board of Education of Louisville v. Society of Alumni of Louisville Male High School*, 239 S.W.2d 931 (Ky. 1951) (Local school boards fulfill a governmental function of state government by providing public education within a particular geographical area).

As pointed out in *Board of Education of Louisville v. Board of Education of Jefferson County, supra*, at 9:

> The tax is used only for school purposes within the county; the subject is one which is local in application but of statewide concern; the tax is one the county is authorized by the Constitution to levy; the legislature, which has the constitutional power to consolidate the entire state as one school district, determined a manner of distributing the proceeds of the tax to the school systems located in

> that county on a basis it deemed appropriate[.] . . .

In *Board of Trustees, Newport Public Library v. City of Newport*, 300 Ky. 125, 187 S.W.2d 806 (1945), the Court considered an act of the General Assembly which required a city to levy a property tax for the purpose of maintaining a public library in the city. The act was attacked as being in violation of the provisions of § 181 of the Kentucky Constitution. The Court held that the act imposed a local tax but that it was for state purposes.

KRS 160.614(3) mandates that any school district which levies a gross receipt license tax "*shall* include the gross receipts . . . of direct satellite broadcast and wireless cable service. . . ." (Emphasis added). Further, the district shall:

> include gross receipts derived from the furnishing of direct satellite broadcast and wireless cable service in the base of its utility gross receipts tax at the same rate as applied to cable service, unless the school district board of education chooses to opt out of this requirement by following the procedures set forth in subsection (5) of this section.

KRS 160.614(4),

Thus, the Commonwealth of Kentucky mandates the imposition of the utilities fee on DBS providers if any utilities tax is imposed. Only under the prescribed statutory guidelines may a local school district "opt out." This statutory provision is consistent

with the previously cited Kentucky case law finding school taxes are state taxes.

Any federal statute must be interpreted in accordance with federal law. *Montgomery v. Huntington Bank,* 346 F.3d 693, 699 (6th Cir. 2003). The Appellees argue that the preemption provision of the Telecommunications Act prohibits enforcement of the utilities tax.

Historically, the police powers of the state are not preempted in the absence of "the clear and manifest purpose of Congress" to do so. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 229, 67 S. Ct. 1146, 1152, 91 L. Ed. 1447 (1947). If the statute contains an express preemption clause, "the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent" *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S. Ct. 1732, 1737, 123 L. Ed. 2d 387 (1993); *Niehoff v. Surgidev Corp.*, 950 S.W.2d 816, 820 (Ky. 1997).

Clearly, § 602 prevents certain local entities from taxing DBS service providers. "When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority, . . . there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation."

Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517, 112 S. Ct. 2608, 2618, 120 L. Ed, 407 (1992), *quoting Malone v. White Motor Corp.*, 435 U.S. 497, 505, 98 S. Ct. 1185, 1190, 55 L. Ed. 2d 443 (1973) and *California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 282, 107 S. Ct. 683, 690, 93 L. Ed. 2d 613 (1987).

However, the "savings clause" in subsection (c) in § 602 contemplates a school tax scenario as prescribed in KRS 160.614(3). The Commonwealth mandates the local school district levy an *ad valorem* tax to obtain the amount of money needed as shown in the general school budget. KRS 160.455. The maximum rate of 3% is prescribed by statute. KRS 160.613. Gross receipts license tax returns and related payments shall be transmitted electronically to the Department of Revenue. KRS 160.6145. The Department of Revenue then distributes the taxes collected to each school district imposing the tax. KRS 160.6154. Finally, the Department of Revenue makes amortized refunds to service providers. KRS 160.6156.

While not explicitly stated in the preemption section, the reason for prohibiting the local jurisdictions from taxing DBS providers revolved around the burden of calculating and paying multiple tax bills with various due dates in any given state.

The current taxing scheme is not overly burdensome to DBS service providers. The district school superintendent must provide the necessary

information to the service provider and Department of Revenue to help determine the geographic location of the subscriber. KRS 160.6152. Any DBS or wireless cable service provider required to pay the utility tax may increase its rates up to 3% to cover the cost of the tax. KRS 160.617. Most importantly, the DBS providers are required to only pay one assessment each quarter.

For the foregoing reasons, it is readily apparent that the tax authorized by the legislation here being attacked (KRS 160.614(3)) is for state purpose. Therefore, the provision of the Telecommunications Act which preserves the right of a state to tax the services of a DBS provider allows for the taxation scheme outlined in KRS 160.614(3).

We therefore reverse and remand with direction that the trial court deny the motions for summary judgment and injunctive relief sought by DIRECTV, Inc., and EchoStar Satellite, L.L.C., and, further, enter an order granting the Department of Revenue's motion for summary judgment, directing that the Appellees register with the Department of Revenue and remit the utility tax, interest and penalties.

HENRY, SENIOR JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: I agree with the majority's interpretation of Kentucky law that a tax imposed by a local school district is a state tax. Such has long been the law in this Commonwealth. *Lamar v. Board of Education of Hancock Co. School District*, 467 S.W.2d 143 (Ky. 1971). However, I believe that the preemption provision of the Federal Telecommunications Act of 1996 is precisely applicable to this legislation and prohibits the enforcement of the tax.

Initially, I differ with the majority that the characterization of the tax as a state tax resolves the issue in this case. Instead, the issue is whether the school districts are local taxing jurisdictions as defined in §602 of the Federal Telecommunications Act which includes in its definition any "municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other local jurisdiction . . . with the authority to impose a tax or fee. . . ." The Act prohibits any tax from being imposed by a local taxing jurisdiction. Thus, I believe the issue is not the nature of the tax but is whether a school district is a local taxing jurisdiction which imposes the tax.

Common sense dictates that a school district be considered a local taxing jurisdiction. Their authority is limited to the area within its district, and pursuant to this legislation, they have the authority to impose

taxes within their geographical boundaries. It is in fact the potential for varying tax rates imposed upon DBS service providers that prompted the enactment of the preemption provision.

As noted by the majority, the reason for prohibiting local taxing jurisdictions from taxing DBS providers is to relieve the providers of the burden of calculating and paying multiple tax bills with various dues dates within a single state. In this Commonwealth there are 175 school districts each of which have chosen to impose the tax at varying rates or to not impose the tax. The boundaries of the various school districts are often difficult to identify since they are not necessarily consistent with traditional political boundaries of cities or counties, thereby imposing upon the provider the onerous task of calculating and paying its tax liability,

The majority suggests that the website provided by the Department of Revenue lifts the burden sought to be prevented by §602 of the Act. Regardless of the success of the Department's efforts, it remains that the Act explicitly prohibits a school district from imposing the tax.

I conclude with an observation concerning the enactment of KRS 160.014. This litigation will undoubtedly be appealed to our Supreme Court and thereafter proceed within the federal judicial system. As a result, the local school districts will be unable to rely on the receipt of the money generated from this tax. Why the legislature chose this more legally

dubious route to tax the providers is, except to the politically wise, unknown.

It is clear that the state has the authority to impose a uniform tax on the DBS providers which could then be distributed to the local school districts. To avoid the loss of needed income to our school districts, during its next session the legislature should enact new legislation imposing a statewide uniform tax on DBS providers in Kentucky with the proceeds to be distributed to the local districts per capita.

I would affirm the trial court's findings that the local school districts are local taxing jurisdictions and that §602(a) of the Federal Telecommunications Act of 1996 preempts KRS 160.014.

BRIEFS AND ORAL ARGUMENT FOR APPELLANTS:

Bethany A. Rice
Office of Legal Services for Department of Revenue
Frankfort, Kentucky

BRIEF FOR APPELLEES:

Kenneth S. Handmaker
Bradley E. Cunningham
Louisville, Kentucky

Pantelis Michalopoulos
Mark F. Horning
Washington, D.C.

ORAL ARGUMENT FOR APPELLEES:

Mark F. Horning
Washington, D.C.

BRIEF FOR *AMICUS CURIAE,* TIME WARNER CABLE, INC.:

Eric S. Tresh
Atlanta, Georgia

Jackson W. White
Lexington, Kentucky

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CIVIL ACTION NO. 05-CI-01623

DIRECTV, INC. and
ECHOSTAR SATELLITE, LLC **PLAINTIFFS**

v.

COMMONWEALTH OF KENTUCKY, MARK TREESH, in his official capacity as Commissioner of the Department of Revenue

and

FRANKFORT INDEPENDENT SCHOOL DISTRICT **DEFENDANTS**

OPINION and ORDER

This matter is before the Court on Plaintiffs' Motion for Summary Judgment. The Court, having considered the arguments and being otherwise sufficiently advised, hereby GRANTS Plaintiffs' Motion.

I. Background

The relevant facts in this case are not in dispute and the issue presented is purely legal. In 2005, the Kentucky Legislature amended KRS 160.614 to include the gross receipts derived from the furnishing of direct satellite broadcast and wireless cable service

("DBS services") as subject to the utility gross receipts license tax. ("School Tax") The School Tax was initially imposed upon providers of utility services, and more recently imposed upon providers of cable services. The amendment provides:

> A utility gross receipts license tax initially levied by a school district board of education on or after July 1, 2005, shall include the gross receipts derived from the furnishing of direct satellite broadcast and wireless cable service in addition to the gross receipts derived from the furnishing of utility services defined in KRS 160.6131 and cable services.[1]

Each board of education of a school district decides whether to levy the School Tax.[2] One hundred fifty-eight of Kentucky's one hundred seventy-six school districts currently levy the tax. Prior to the 2005 amendment, the Kentucky Legislature transferred the collection and administration of the utilities gross receipts license tax from the school districts to the Kentucky Department of Revenue.[3]

Plaintiffs Directs, Inc., and Echostar Satellite, LLC, ("Plaintiffs") are providers of DBS services. The Department of Revenue has taken the position that Plaintiffs are subject to the tax. Plaintiffs instigated

---

[1] See KRS 160.614(3); 2005 Ky. Acts. Ch. 168, sec. 130, effective March 18, 2005.

[2] See KRS 160.593(1).

[3] See 2004 Ky. Act ch. 79, sec. 6, effective July 1, 2005.

this action to obtain a declaration that the recent amendment to KRS 160.614 to include DBS providers as subject to the School Tax is preempted by Section 602 of the Federal Communications Act of 1996.

II. Discussion

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." CR 56.03

In this case, summary judgment is appropriate as there is no genuine issue of material fact; the issue is purely legal. The question is whether KRS 160.614 that subjects DBS providers to the School Tax is preempted by Section 602 of the Federal Communications Act.

Section 602 provides in part (a):

> Preemption, A provider of direct-to-home satellite service shall be exempt from the collection or remittance, or both, of any tax or fee imposed by any local taxing jurisdiction on direct-to-home satellite service.[4]

---

[4] See Communications Act of 1996, P.L. 1045, Title VI, Section 602(a), 110 Stat. 144, reprinted in 47 USC Section 152, Application Note 2.

However, part (c) provides:

> Preservation of State Authority. This section shall not be construed to prevent taxation of a provider of direct-to-home satellite service by a State or to prevent a local taxing jurisdiction from receiving revenue derived from a tax or fee imposed and collected by a State.[5]

In other words, the Federal Communications Act ("FCA") explicitly states that local taxing jurisdictions may not impose any taxes or fees on DBS service providers. Section (c) clarifies that the State may tax DBS service providers directly and/or by imposing *and* collecting the tax then sending the proceeds to local taxing jurisdictions. (*emphasis added*)

Therefore, the sub-issues include: whether the School Tax is a tax imposed by a "local taxing jurisdiction"; and if so, whether the FCA expressly preempts the amended version of KRS 160.614.

A. The term "local taxing jurisdiction" includes the local school board.

Section 602 Part (b) defines the term "local taxing jurisdiction" as:

> (A)ny municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other local jurisdiction in

---

[5] See Communications Act of 1996 Section 602(c).

> the territorial jurisdiction of the United States with the authority to impose a tax or fee, but does not include a State.[6]

Since a local school board is not specifically included within the definition, the question becomes whether the school board is considered "any other local jurisdiction . . . with the authority to impose a tax or fee."[7] The Court believes that it is.

Defendants argue that taxes imposed by local school districts are considered state taxes rather than local taxes.[8] To support that argument, Defendants cite several instances when the Kentucky Supreme Court has upheld that position.[9] However, Defendants' argument is misplaced. State law does not control the interpretation of federal law; federal law is used to interpret federal statutes. In fact, the United States Supreme Court has held, "it is so [sic] be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law."[10] Instead of utilizing state law, this Court

---

[6] See Communications Act of 1996, Section 602(b).

[7] *Id.*

[8] Feb. 24, 2006 Brief on Behalf of Commissioner Treesh p. 5.

[9] See *Commonwealth, by Board, Revenue Agent v. Louisville National Bank*, 220, Ky. 89, 294 S.W. 815, 817 (Ky. 1927); *Lamar v. Board of Education of the Hancock County School District*, 467 S.W.2d 143, 146 (Ky. 1971).

[10] *NLRB v. Natural Gas Util. Dist.*, 402 U.S. 600, 603 (1971) (internal quotation marks omitted)

must look to federal statutory guidance; namely the Federal Communications Act.

Defendants further argue that the State is imposing the tax pursuant to Section 602(c) because the collection and administration of the School Tax is through the Commonwealth of Kentucky Department of Revenue. That argument fails to address the portion of Section 602(c) that requires the State to impose the tax as well as to collect it. In this case, the decision whether or not to impose the School Tax is made by the local school board; not by the State. Therefore, Section 602(c) does not apply and Defendants' argument must fail.

The next question is whether local school boards are "local taxing jurisdictions" pursuant to Section 602(b). The Court finds that they are. First, the plain meaning and interpretation of a local school board that can decide whether or not to impose a tax leads to the conclusion that the school board is a local taxing jurisdiction. The dictionary supports such a conclusion in that a "local jurisdiction" is a government that has authority only within the local area.[11] Additionally, school boards are similar to other types of state subdivisions included in the statutory definition provided in Section 602(b) such as single function transportation districts. Since Section 602(b) gives specific examples of local taxing jurisdictions as

---

[11] See, *Merriam-Webster's Collegiate Dictionary*, Eleventh Edition 730.

well as states "any other local jurisdiction," we find local school boards included under the term "local taxing jurisdictions."

B. KRS 160.614, as amended, is expressly preempted by Section 602 of the Federal Communications Act.

Preemption is a fundamental principal of Constitutional law. The Supremacy Clause in Article IV of the United States Constitution states that the laws of the United States "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary Notwithstanding."[12] In this case, express preemption is implicated because the language in the FCA Section 602(a) is titled "Preemption."

Thus, the conclusion is elementary. As written above, this Court finds the school boards both "impose" the School Tax and qualify as a "local taxing jurisdiction." Section 602(a) titled "Preemption" expressly states a local taxing jurisdiction may not impose a tax on DBS service providers. Thus, the amended version of KRS 160.614 that allows for such action is preempted.

---

[12] 12 U.S. Const. Art. VI, Cl. 2.

III. Conclusion

ACCORDINGLY, IT IS HEREBY ORDERED Plaintiffs' Motion for Summary Judgment is GRANTED. The utility license tax on gross receipts is preempted by Section 602 of the Federal Communications Act of 1996 insofar as it applies to DBS providers. Defendants are permanently enjoined from taking steps to require Plaintiffs to comply with the amended version of KRS 160.614 as it applies to DBS service providers.

This is a FINAL and APPEALABLE ORDER, and THERE IS NO JUST CAUSE FOR DELAY.

SO ORDERED, this 22 day of August 2006.

/s/ Thomas Wingate
Thomas Wingate
Franklin Circuit Court
Division II

DISTRIBUTION:
Kenneth S. Handmaker
Bradley E. Cunningham
Middleton Reutlinger
2500 Brown & Williamson Tower
Louisville, KY 40202

Betty Jo Christian
Mark F. Horning
Steptoe & Johnson LLP
1330 Connecticut Ave, NW
Washington, DC 20036

Bethany Atkins Rice
Office of Legal Services for Revenue
PO Box 423
Frankfort, KY 40602-0423

Telecommunications Act of 1996, Sec.602, 47 U.S.C. Sec. 152 note

Pub.L. 104-104, Title VI, § 602, Feb. 8, 1996, 110 Stat. 144, provided that:

"(a) **Preemption.** – A provider of direct-to-home satellite service shall be exempt from the collection or remittance, or both, of any tax or fee imposed by any local taxing jurisdiction on direct-to-home satellite service.

"(b) **Definitions.** – For the purposes of this section –

> "(1) **Direct-to-home satellite service.** – The term 'direct-to-home satellite service' means only programming transmitted or broadcast by satellite directly to the subscribers' premises without the use of ground receiving or distribution equipment, except at the subscribers' premises or in the uplink process to the satellite.
>
> "(2) **Provider of direct-to-home satellite service.** – For purposes of this section, a 'provider of direct-to-home satellite service' means a person who transmits, broadcasts, sells, or distributes direct-to-home satellite service.
>
> "(3) **Local taxing jurisdiction.** – The term 'local taxing jurisdiction' means any municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other local jurisdiction in the territorial jurisdiction of the United States with the authority to impose a tax or fee, but does not include a State.

"(4) **State.** – The term 'State' means any of the several States, the District of Columbia, or any territory or possession of the United States.

"(5) **Tax or fee.** – The terms 'tax' and 'fee' mean any local sales tax, local use tax, local intangible tax, local income tax, business license tax, utility tax, privilege tax, gross receipts tax, excise tax, franchise fees, local telecommunications tax, or any other tax, license, or fee that is imposed for the privilege of doing business, regulating, or raising revenue for a local taxing jurisdiction.

"(c) **Preservation of State authority.** – This section shall not be construed to prevent taxation of a provider of direct-to-home satellite service by a State or to prevent a local taxing jurisdiction from receiving revenue derived from a tax or fee imposed and collected by a State."

KRS 160.613 Utility gross receipts license tax – Exemptions.

(1) There is hereby authorized a utility gross receipts license tax for schools not to exceed three percent (3%) of the gross receipts derived from the furnishing, within the district, of utility services, except that "gross receipts" shall not include amounts received for furnishing energy or energy-producing fuels, used in the course of manufacturing, processing, mining, or refining to the extent that the cost of the energy or energy-producing fuels used exceeds three percent (3%) of the cost of production, and shall not include amounts received for furnishing any of the above utilities which are to be resold.

(2) If any user of utility services purchases the utility services directly from any supplier who is exempt either by state or federal law from the utility gross receipts license tax, then the consumer, if the tax has been levied in the consumer's district, shall be liable for the tax and shall pay directly to the department, in accordance with the provisions of KRS 160.615, a utility gross receipts license tax for schools computed by multiplying the gross cost of all utility services received by the tax rate levied under the provisions of this section.

Effective: July 1, 2005

History: Amended 2004 Ky. Acts ch. 79, sec. 2, effective July 1, 2005. – Amended 2002 Ky. Acts ch. 69, sec. 5, effective July 15, 2002. – Amended 1998 Ky. Acts ch. 500, sec. 1, effective July 15, 1998. –

Repealed and reenacted 1990 Ky. Acts ch. 476, Pt. V, sec. 462, effective July 13, 1990. – Amended 1980 Ky. Acts ch. 27, sec. 1, effective March 6, 1980. – Amended 1974 Ky. Acts ch. 250, sec. 1. – Created 1966 Ky. Acts ch. 24, Part III, sec. 9.

KRS 160.614. Tax on gross receipts from furnishing of cable television services.

(1) A utility gross receipts license tax initially levied by a school district board of education on or after July 13, 1990, shall be levied on the gross receipts derived from the furnishing of cable service in addition to the gross receipts derived from the furnishing of the utility services defined in KRS 160.6131.

(2) A utility gross receipts license tax initially levied by a school district board of education prior to July 13, 1990, shall be levied on the gross receipts derived from the furnishing of cable service, in addition to the gross receipts derived from the furnishing of the utility services defined in KRS 160.6131, if the school district board of education repeats the notice and hearing requirements of KRS 160.603, but only as to the levy of the tax on the gross receipts derived from the furnishing of cable service.

(3) A utility gross receipts license tax initially levied by a school district board of education on or after July 1, 2005, shall include the gross receipts derived from the furnishing of direct satellite broadcast and wireless cable service in addition to the gross receipts derived from the furnishing of utility services defined in KRS 160.6131 and cable service.

(4) Any school district that has cable service included in the base of a utility gross receipts tax levied prior to July 1, 2005, shall, as of July 1, 2005, include gross receipts derived from the furnishing of direct satellite broadcast and

wireless cable service in the base of its utility gross receipts tax at the same rate as applied to cable service, unless the school district board of education chooses to opt out of this requirement by following the procedures set forth in subsection (5) of this section.

(5) Any school district board of education may elect to opt out of the base expansion required by subsection (4) of this section. However, any district electing to opt out of the provisions of subsection (4) of this section shall also remove from the base of its utility gross receipts tax all gross receipts from the furnishing of cable service. To opt out of the provisions of subsection (4) of this section, a school district board of education shall, before May 1, 2005:

(a) Determine the amount of revenue that will be lost from removing gross receipts of cable service from the base of the utility gross receipts tax, and how that revenue will be replaced; and

(b) Provide written notice of the intent to opt out of the base expansion required by subsection (4) of this section to the Department of Revenue, the Department of Education, all cable service providers operating in the district, and the public.

1. Notice to the public shall be accomplished through the publication at least one (1) time in a newspaper of general circulation in the county, or by a posting at the courthouse door if there is no such newspaper, of the fact that the

district board has elected to opt out of the base expansion required by subsection (4) of this section. The notice shall include the following information:

a. The amount of revenue that will be lost from removing gross receipts of cable service from the base of the utility gross receipts tax and how that revenue will be replaced; and

b. The date, time, and location of a meeting of the board, not earlier than one (1) week or later than two (2) weeks from the date of the notice, for the purpose of hearing comments regarding the proposed action of the board, and explaining the reasons for the proposed action.

2. The board of education shall conduct a public hearing at the place and on the date and time provided in the notice for the purpose of hearing comments regarding the proposed action of the board, and explaining the reasons for the proposed action.

(Enact. Acts 1990, ch. 476, Pt. III, § 115, effective July 13, 1990; 2004, ch. 79, § 3, effective July 1, 2005; 2005, ch. 168, § 130, effective March 18, 2005.)

Supreme Court, U.S.
FILED
NOV 25 2009
OFFICE OF THE CLERK

No. 09-355

IN THE

Supreme Court of the United States

MARK TREESH, in his official capacity as Commissioner of the Kentucky Department of Revenue, and FRANKFORT INDEPENDENT SCHOOL DISTRICT, FRANKFORT, KENTUCKY,

Petitioners,

v.

DIRECTV, INC., and ECHOSTAR SATELLITE, L.L.C.,

Respondents.

On Petition for a Writ of Certiorari to the Kentucky Supreme Court

BRIEF IN OPPOSITION

Pantelis Michalopoulos
Mark F. Horning
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
202-429-3000

E. Joshua Rosenkranz
Counsel of Record
Richard W. Mark
Jeremy N. Kudon
ORRICK, HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, New York 10103
212-506-5000

Counsel for Respondents

November 25, 2009

QUESTION PRESENTED

To protect national satellite TV providers from being mired in an array of local taxes that would hinder their ability to compete in a market dominated by cable TV operators, Congress ordered that satellite TV providers "shall be exempt" from taxes imposed by "any local taxing jurisdiction." The question presented is whether the Kentucky Supreme Court correctly held in a unanimous decision that Congress's express mandate preempts taxes on satellite TV imposed by over 150 local school districts in Kentucky—which are situated just like thousands of other local taxing authorities nationwide.

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

All parties are identified in the case caption.

Respondent DIRECTV, Inc. has the following parent corporations: DIRECTV Enterprises, LLC, DIRECTV Holdings LLC, The DIRECTV Group, Inc., and DIRECTV. There is no publicly held company that owns 10% or more of DIRECTV, Inc.'s stock. Respondent EchoStar Satellite L.L.C., now known as DISH Network L.L.C. ("DISH"), has the following parent corporations: DISH DBS Corporation, DISH Orbital Corporation, and DISH Network Corporation. There is no publicly held company that owns 10% or more of DISH's stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT 2

- Congress Preempts Local Taxes On Satellite TV 2
- Notwithstanding Congress's Express Prohibition, Kentucky Authorizes Local Taxes On Satellite TV 3
- The Circuit Court Holds That Federal Law Preempts The Utility Tax Imposed by Local School Districts 5
- Over A Vigorous Dissent, The Court Of Appeals Reverses The Circuit Court. 6
- The Kentucky Supreme Court Reverses And Holds, Unanimously, That The Utility Tax Is Preempted 7

REASONS TO DENY THE WRIT 8

I. THERE IS NO SPLIT OF AUTHORITY ON THE QUESTION PRESENTED 8

II. THE UNANIMOUS DECISION BELOW DOES NOT GIVE RISE TO A QUESTION OF PROFOUND NATIONAL IMPORTANCE 9

TABLE OF CONTENTS
(continued)

Page

III. THE KENTUCKY SUPREME COURT'S DECISION WAS A TEXTBOOK APPLICATION OF RECENT SUPREME COURT DECISIONS 12

A. The Court Below Applied Established Precedent Faithfully To Conclude That The Utility Tax Was Preempted 12

B. The Kentucky Supreme Court's Analysis Was Consistent With This Court's Precedent Regarding Clear Direction from Congress on Preemption 14

C. The Kentucky Supreme Court Correctly Held That Local School Districts Impose the Utility Tax In Violation of § 602(a) 16

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

CASES

Cal. State Bd. of Equalization v. Sierra Summit, Inc.,
490 U.S. 844 (1989).....14, 15

City of Louisville v. Sebree,
308 Ky. 420, 214 S.W.2d 248 (1948) 18

Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.,
128 S. Ct. 2326 (2008).....14, 15

Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996)..... 12

Miss. Band of Choctaw Indians v. Holyfield,
490 U.S. 30 (1989)..... 18

Montgomery v. Huntington Bank,
346 F.3d 693 (6th Cir. 2003) 17

NLRB v. Natural Gas Util. Dist.,
402 U.S. 600 (1971)..... 17

STATUTES

Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56, 56 (1996) 2

TABLE OF AUTHORITIES
(continued)

Page(s)

Telecommunications Act of 1996, Pub. L. No. 104–104, § 602, 110 Stat. 56, 144–45 (1996) ..... *Passim*

KY. REV. STAT. ANN. § 160.593 ..... 3, 4, 16

KY. REV. STAT. ANN. § 160.613 4

KY. REV. STAT. ANN. § 160.613(1) 5, 17

KY. REV. STAT. ANN. § 160.6131(7) 4

KY. REV. STAT. ANN. § 160.614 4

KY. REV. STAT. ANN. § 160.614(4) 4, 5, 16

KY. REV. STAT. ANN. § 160.614 (5) 4, 5, 16

KY. REV. STAT. ANN. § 160.6154 5

OTHER AUTHORITIES

http://revenue.ky.gov/business/utilschool.html 5

INTRODUCTION

This case has all the hallmarks of a cert. denial.

First, the case does not present a split in authority among any of the state or the federal courts. In fact, in the 13 years that have passed since Congress enacted § 602, not a single court outside of Kentucky has been called upon to interpret the statute.

Second, this case does not present the Court with an issue of profound national importance. The Department argues that it is necessary for this Court to intervene because there is confusion regarding "[h]ow [the States] may tax DBS providers" in light of the Kentucky Supreme Court's interpretation of § 602. Pet. 32-33. This assertion, however, is belied by the plain language of the statute. Section 602 says clearly what taxes are preempted and what taxes are permitted. It is also at odds with the empirical evidence. Twenty-nine states have levied a tax on satellite TV sales or revenues since § 602 was enacted in 1996. Kentucky aside, none have enacted a tax that comes even close to running afoul of federal law. Given that Kentucky has the same opportunity as those states to enact a state-level non-preempted tax on satellite TV, there is nothing about this case that requires this Court to grant review.

Third, the Kentucky Supreme Court's decision followed this Court's express preemption doctrine by giving effect to unambiguous statutory language reflecting clear Congressional intent. The canon of construction the Department invokes—that courts

must "proceed carefully when asked to recognize an exemption from taxation that Congress has not clearly expressed," Pet. 11 (quoting *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326 (2008)), does not apply here because Congress expressly stated its intention in the plainest terms possible to preempt local taxation of satellite TV providers.

STATEMENT[1]

Congress Preempts Local Taxes On Satellite TV.

With the Telecommunications Act of 1996, Congress set out to "promote competition and reduce regulation" in the telecommunications industry, and to "encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104–104, 110 Stat. 56, 56 (1996). One of its specific objectives was to create a more uniform regulatory environment for satellite TV, sometimes called direct broadcast satellite or DBS. Part of that undertaking was the enactment of § 602, the statute at issue in this case. Section 602(a) is a preemption clause that addresses local taxation of satellite TV:

> (a) Preemption.—A provider of direct-to-home satellite service shall be exempt from the collection or remittance, or both, of any tax or fee imposed by any local taxing

[1] The petition is cited as "Pet." and the Appendix to the petition is cited as "App."

> jurisdiction on direct-to-home satellite service.

Pub. L. No. 104–104, § 602(a), 110 Stat. 56, 144 (codified at 47 U.S.C. § 152 note).

Congress broadly defined "local taxing jurisdiction" to include a number of examples as well as "any other local jurisdiction in the territorial jurisdiction of the United States with the authority to impose a tax or fee." § 602(b)(3). Likewise, § 602(b)(5) broadly defines "tax or fee" to include examples such as a "utility tax" and a "gross receipts tax," along with "any other tax, license, or fee that is imposed for the privilege of doing business, regulating, or raising revenue for a local taxing jurisdiction."

Finally, Congress emphasized that its prohibition is directed toward local bodies, and that States retain the authority to impose their own taxes, and distribute the revenue to local governments: "This section shall not be construed to prevent taxation of a provider of direct-to-home satellite service by a State or to prevent a local taxing jurisdiction from receiving revenue derived from a tax or fee imposed and collected by a State." § 602(c).

Notwithstanding Congress's Express Prohibition, Kentucky Authorizes Local Taxes On Satellite TV.

Kentucky law authorizes local school districts to impose various taxes on activities conducted within their respective boundaries. The statute provides that "[a]ny board of education of a school district

may . . . levy school taxes authorized" by Chapter 160. KY. REV. STAT. ANN. § 160.593 (2009). One of those taxes is a "utility gross receipts license tax for schools not to exceed three percent (3%) of the gross receipts derived from the furnishing, within the district, of utilities services." *Id.* § 160.613.

Historically, the utility tax did not cover satellite TV. But in 2005, Kentucky revised the statute and gave local school districts the option of extending the tax to "direct satellite broadcast" providers. *Id.* § 160.614. "Direct satellite broadcast" is defined to include "direct broadcast satellite service . . . with programming or voice transmitted or broadcast by satellite . . . directly to the purchaser's premises." *Id.* § 160.6131(7). That definition parallels Congress's definition of "direct-to-home satellite services" in the Telecommunications Act, *see* § 602(b)(1), making Respondents both "direct-to-home" providers for federal purposes and "direct satellite broadcast" providers for Kentucky purposes.

Kentucky did not impose a statewide utility tax on satellite TV service. Rather, the state legislature authorized each local school district to decide for itself whether to impose a utility tax at all. KY. REV. STAT. ANN. § 160.593 ("Any board of education of a school district *may* . . . levy school taxes" including the utility tax.") (emphasis added). Further, the state law contains an "opt out" provision directed specifically at satellite and cable TV. *Id.* § 160.614(4), (5). The provision gave a school district that was already imposing utility taxes the discretion to decide whether to "opt out"

of extending the taxes specifically to satellite and cable TV. *Id.*

Those school districts that elect to impose the utility tax and extend it to satellite TV have another decision to make: They must set the rate of the tax. Each district can determine its own tax rate up to 3% of gross receipts. *Id.* § 160.613(1). The Department of Revenue's website punctuates the point, explaining that "[t]he service provider collects the tax *based on the rate established by the local authority*." Utility Gross Receipts License Tax (School),http://revenue.ky.gov/business/utilschool.html (emphasis added). Only then does the State get involved. In stark contrast to the policy judgments committed to the local districts, the State's role is limited to the ministerial task of collecting the tax that each district has chosen to impose. *See* KY. REV. STAT. ANN. § 160.6154.

At last count, 158 districts have chosen to impose the utility tax on satellite TV service, while 18 have chosen not to. App. 33.

The Circuit Court Holds That Federal Law Preempts The Utility Tax Imposed by Local School Districts.

Respondents are the nation's two largest providers of satellite TV services. They serve 31 million households nationwide, including 500,000 in Kentucky.

Respondents sued the Commissioner of the Department of Revenue and the Frankfort Independent School District (collectively, the "Department") in Franklin Circuit Court.

Respondents argued that the utility tax is preempted by § 602(a) insofar as it applies to satellite TV services. They sought declaratory relief and an injunction against collection of the tax.

The Circuit Court granted Respondents' motion for summary judgment and enjoined enforcement of the utility tax against satellite TV providers. The court described its conclusion that § 602 preempts the school district tax on satellite TV providers as "elementary" in light of Congress's clear words: The local school districts "both 'impose' the [utility tax] and qualify as a 'local taxing jurisdiction,'" and § 602(a) "expressly states [that] a local taxing jurisdiction may not impose a tax on DBS service providers." App. 38.

Over A Vigorous Dissent, The Court Of Appeals Reverses The Circuit Court.

A divided Court of Appeals reversed the Circuit Court's decision. The majority concluded that the express preemption provision in § 602(a) did not apply because Kentucky law regards education as a state rather than a local function and thus hold that the tax was imposed for a state purpose. App. 23. It did not explain why the purpose of the tax under state law was germane to the explicit federal definition of "local taxing jurisdiction" in § 602(a). The court also noted that the State collects the taxes on the school districts' behalf and then sends the revenue back to the districts. *Id.* It did not, however, explain how the language of § 602(c), which explicitly requires the State to both "collect[] and impose[]" a tax on satellite TV to avoid

preemption, could be read to allow local school districts to impose utility taxes.

The dissenting judge explained that "the issue is not the nature of the tax but is whether a school district is a local taxing jurisdiction which imposes the tax." App. 28. On that issue, he concluded that "[c]ommon sense dictates that a school district be considered a local taxing jurisdiction." *Id.*

The Kentucky Supreme Court Reverses And Holds, Unanimously, That The Utility Tax Is Preempted.

The Kentucky Supreme Court unanimously reversed the Court of Appeals, and held that the utility tax was preempted by § 602. To reach its conclusion, the court applied clearly defined principles of express preemption that this Court has often repeated.

The court observed that § 602(a) expressly preempted "any tax or fee imposed by any local taxing jurisdiction," and that Kentucky's local school districts met the definition of a "local taxing jurisdiction." App. 6. Thus, because it was "undisputed that the gross receipts license taxes at issue are imposed by approximately 140 of Kentucky's 170 local school districts," the Kentucky Supreme Court concluded that federal law preempted the utility tax. App. 6-7.

While not necessary given the clarity of § 602(a), the court emphasized the point by examining the legislative history of the provision. It correctly concluded that Congress's intent with § 602 was to "spare national businesses with little impact on

local resources from the administrative costs and burdens of local taxation in the myriad local jurisdictions where their services would be sold" and that "[c]ompliance with an enormous hodgepodge of local taxes would impose administrative costs, which, in Congress's view, were undue since satellite providers . . . do not depend on local rights-of-way or a community's 'physical facilities or services.'" App. 10.

When the court compared the disputed tax to the legislative history of § 602, it arrived at the only possible conclusion: That "Kentucky's gross receipts license tax entails precisely the locality-by-locality administrative burdens Congress intended to preempt," App. 11, and is therefore barred by § 602(a) of the Telecommunications Act of 1996.

The Department now petitions this Court to review the unanimous decision of the Kentucky Supreme Court for error.

REASONS TO DENY THE WRIT

The petition should be denied because: (I) It presents no split of authority; (II) this case presents no issue of national importance that warrants this Court's intervention; and (III) the Kentucky Supreme Court's analysis was both correct and consistent with this Court's established jurisprudence.

I. THERE IS NO SPLIT OF AUTHORITY ON THE QUESTION PRESENTED.

The Department concedes that the Kentucky Supreme Court's decision is not in conflict with the

decision of any other state or federal court. Pet. 33. What it neglects to mention, however, is that other than this case, no court has ever been asked to interpret § 602.

At a minimum, this means the question presented is not ripe for this Court's review. It is also empirical evidence that there is nothing confusing about the scope of § 602 that requires this Court to intervene. Indeed, the fact that all seven justices of the Kentucky Supreme Court agreed that § 602 preempted the utility tax speaks volumes about this case. A cynic might expect an elected judiciary in one of the poorest states in the nation to stretch to find any way to draw more tax revenues into its faltering school system. Their unanimity confirms there was no way to construe either § 602 or the utility tax to save the latter from preemption.

II. THE UNANIMOUS DECISION BELOW DOES NOT GIVE RISE TO A QUESTION OF PROFOUND NATIONAL IMPORTANCE.

Nor does this case present an issue of national importance that requires this Court to intervene. The Department argues that cert. should be granted because of some question regarding "[h]ow [the States] may tax DBS providers" in light of the court's interpretation of § 602 below. Pet. 32. Despite the absence of any evidence that such confusion actually exists, the Department asserts that "[i]t is important for this Court to intervene now to clarify the scope of the exemption allowed

by § 602 because . . . States need the money now!" Pet. 33.

While States may need money, there is nothing profound or important about the Kentucky Supreme Court's interpretation of § 602. For starters, the answer to "how the States may tax DBS providers" is found in the plain language of § 602. As discussed above, § 602(a) exempts satellite TV providers only from collecting or paying taxes imposed by local governments. It says nothing about taxes imposed on satellite TV at the state level. But to avoid any confusion, Congress went one step further, and made clear in § 602(c) that:

> This section [§ 602] shall not be construed to prevent taxation of a provider of direct-to-home satellite service by a State or to prevent a local taxing jurisdiction from receiving revenue derived from a tax or fee imposed and collected by a State.

Pub. L. No. 104-104, § 602(c), 110 Stat. 56, 145 (codified at 47 U.S.C. § 152 note).

Thus, § 602 provides States with a virtual instruction manual on how to tax satellite TV providers consistent with federal law. It answers questions like:

- Can a state legislature impose a tax on satellite TV and direct the proceeds to a town or transportation district? Yes.
- Can a municipality levy a sales tax on a satellite TV provider? No.

It also helps explain why there is no confusion in the States regarding the scope of § 602. Twenty-nine states have enacted legislation that imposes some form of state tax on satellite TV sales or revenues. In accordance with § 602(c), a number of these states direct a portion of the revenue generated from those taxes to municipalities. Kentucky aside, none of them has enacted a tax that comes even close to violating § 602. Kentucky has the same opportunity as other states to secure funding for its schools without running afoul of federal law. Given this opportunity, the importance of this case does not come even close to the level of importance necessary for this Court to grant review.

At bottom, the Department is right. This petition is all about money—and specifically, Kentucky's need for "money now!" The Department wants this Court to reverse the decision below not because of any legal question about the scope of preemption under § 602, or confusion regarding how it can tax satellite TV without violating federal law. Rather, the Department wants a reversal so that it can collect the roughly $70 million in taxes, interest, and penalties that Respondents would have owed if the Kentucky Supreme Court had simply affirmed the Court of Appeals. Just as this Court does not sit as a court of errors, it does not sit to solve Kentucky's budget woes.

III. THE KENTUCKY SUPREME COURT'S DECISION WAS A TEXTBOOK APPLICATION OF RECENT SUPREME COURT DECISIONS.

A. The Court Below Applied Established Precedent Faithfully To Conclude That The Utility Tax Was Preempted.

In concluding that Kentucky's local school districts violate § 602(a) when they levy utility taxes on satellite TV providers, the Kentucky Supreme Court faithfully and correctly applied the principles this Court has laid out in its decisions on express preemption.

The Kentucky Supreme Court began by correctly reciting the controlling legal principles. The court observed that "[w]here, as in this case, Congress has expressly declared its intention to preempt an area of state law, a reviewing court's task is reduced to determining the scope of the intended preemption." App. 5. Quoting from this Court's decision in *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996), the court below acknowledged that the "ultimate touchstone" of this Court's preemption analysis was to understand the "congressional purpose" of § 602, which "primarily is discerned from the language of the preemption statute and the statutory framework surrounding it." App. 6 (quoting *Lohr*, 518 U.S. at 485-86). Consistent with this Court's preemption analysis, the Kentucky Supreme Court also recognized that legislative history is "an important indicator of Congress's intent." *Id.* (citing *Shaw v. Delta*, 463

U.S. 85 (1983)). Significantly, the Department does not dispute that the Kentucky court stated the law correctly. Rather, it argues that the court below reached the wrong result in applying the well settled law to the facts of this case. But the Department is wrong.

The court below first looked at the plain language of § 602(a) and held that the utility tax fell squarely within its ambit. The Kentucky Supreme Court did not reach this conclusion based on some "expansive interpretation" of § 602. Instead, it simply recognized that "local taxing jurisdiction" is defined in § 602 to include "any other local jurisdiction in the territorial jurisdiction of the United States with the authority to impose a tax or fee, but does not include a State." The court concluded that this broad definition easily encompassed school districts:

> It is undisputed that the gross receipts license taxes at issue are imposed by approximately 140 of Kentucky's 170 local school districts; that each district may set the applicable tax rate, with the rates varying from district to district; and that a given district may exempt cable and satellite programming providers from the tax altogether if it so decides.

App. 6-7. Based on those facts, the court held that the plain language of § 602 expressly preempted the utility tax. App. 7-8.

Finally, the court looked to the legislative history of § 602 to buttress its conclusion. App. 8.

It noted that "Congress's intent with Section 602 was not to spare [satellite TV] providers from taxation as such, but to spare national businesses with little impact on local resources from the administrative costs and burdens of local taxation in the myriad local jurisdictions where their services would be sold." App. 10. The court observed that even if those burdens are less significant in light of recent technology—a key argument raised by the Department both here and below—it does not matter, "for Congress has determined that the burden may not be imposed at all." App. 11. Put another way, the Kentucky Supreme Court correctly refused to unilaterally amend § 602 to reach the outcome the Department (and local school districts) desired.

B. The Kentucky Supreme Court's Analysis Was Consistent With This Court's Precedent Regarding Clear Direction from Congress on Preemption.

The Department argues that the Kentucky Supreme Court erred by failing "to recognize and consider" the canon of statutory construction "that courts should proceed carefully when asked to recognize an exemption from taxation that Congress has clearly expressed." Pet. 11. Relying on this Court's decisions in *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2337–38 (2008), and *Cal. State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 851 52 (1989), it asserts that the Kentucky Supreme Court violated this canon by failing to "consider a more narrow

interpretation" of § 602 that would allow local school districts to levy a tax on satellite TV providers that was mandated by the state legislature.

The Department is mistaken. The canon of statutory construction upon which it relies applies only in situations where the language of the preemption statute is ambiguous or has been applied in a way that defies its plain meaning. The statute at issue in *Piccadilly*, for instance, provided a tax exemption for any asset transferred "under a plan *confirmed* under [Chapter 11] of the Bankruptcy Code." 128 S. Ct. at 2329 (emphasis added). Piccadilly, however, was granted a tax exemption for assets transferred before its Chapter 11 plan was confirmed by the Bankruptcy Court. *Id.* at 2329–30. This Court looked first to the statute's plain language and concluded that the "more natural reading" would not exempt asset transfers from state taxation until after the bankruptcy plan had been confirmed. *Id.* at 2333. The Court also observed that even if the statute was ambiguous, federalism canons would compel it to construe the statute's exemption narrowly, thus leading to the same result. *Id.* at 2338; *see also Sierra Summit*, 490 U.S. at 851 (relying on same federalism canon to hold that state tax was not preempted by federal law where neither plain language nor legislative history called for broad exemption of state taxes).

But the federalism canon discussed in *Piccadilly* has no bearing on this case. Section 602 is plainly an express preemption clause—it even bears the

label "Preemption." The statute also unambiguously delineates the scope of Congress's preemptive aim: Satellite TV providers "shall be exempt from . . . any tax . . . imposed by any local taxing jurisdiction" on satellite TV providers. § 602(a). This was not a situation, like *Piccadilly*, where the lower court interpreted the statute in a way that violated its plain language. The Kentucky Supreme Court simply applied the natural meaning of the statute's plain language to a tax that was admittedly imposed by local school districts rather than the state legislature.

At the end of the day, the Department's complaint is not that the court below interpreted § 602(a) incorrectly, but rather that it refused to interpret the statute in a way that would contradict the express intent of Congress.

C. The Kentucky Supreme Court Correctly Held That Local School Districts Impose the Utility Tax In Violation of § 602(a).

Each of the Department's other critiques is similarly flawed.

The Department contends, for instance, that the court erred by rejecting the argument that it was the state legislature, and not the local school districts, that "imposed" the tax. This assertion, however, ignores the plain language of the state statute. Each school district is responsible for deciding whether to levy the utility tax at all, and whether to extend it to satellite TV in particular. KY. REV. STAT. ANN. §§ 160.593, 160.614(4), (5).

As the Circuit Court observed, "the decision whether or not to impose the School Tax is made by the local school board; not the State." App. 37. What is more, the local school districts also determine their own tax rates, within the 3% limit. KY. REV. STAT. ANN. § 160.613(1).

The Department also claims that the utility tax falls outside of § 602 because Kentucky state law regards it as imposed for a state purpose. But even if this was true, it would not save the tax from § 602(a). The question under § 602(a) and (c) is not whether a tax "levied and collected by municipal or county or district officers" is for a state or local purpose. The question under federal law is simply whether the tax is (1) "imposed by any local taxing jurisdiction," or rather (2) "imposed and collected by a State." If a tax falls into the former category, it is preempted, regardless of its purpose.

Moreover the Department's argument runs head-on into the rule that "[i]n the absence of a plain indication to the contrary,'" federal statutes are not to be interpreted as turning on state law. *NLRB v. Natural Gas Util. Dist.*, 402 U.S. 600, 603 (1971) (quotation omitted); *see also Montgomery v. Huntington Bank*, 346 F.3d 693, 699 (6th Cir. 2003) ("State law . . . cannot be our reference point. Rather, to give proper meaning to a federal statute we must be guided by the plain meaning of the statute, canons of statutory construction, relevant legislative history, and other indicia . . . ."). Given Congress's unmistakable interest in promoting uniformity with § 602, there is no basis for interpreting § 602 to incorporate anything like the

majority's "state purpose" test. *Cf. Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 45 (1989) ("Congress could hardly have intended the lack of nationwide uniformity that would result from state-law definitions of domicile.").

Finally, it should be noted that Kentucky's school districts are no different from thousands of other local jurisdictions throughout the United States. True, the State authorized the tax in the first place. But contrary to the Department's assertion, that does not mean that the State "imposed" the tax. If any tax that a state has authorized is a "state tax" and thus outside the scope of preemption, then § 602 would be a nullity. Local governments are creatures of the state, and any taxation powers they exercise derive from the state. *See, e.g., City of Louisville v. Sebree*, 308 Ky. 420, 425, 214 S.W.2d 248, 251 (1948) ("[A] municipality's power to tax is only that which the legislature has granted it.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

E. Joshua Rosenkranz
Counsel of Record
Richard W. Mark
Jeremy N. Kudon
Orrick Herrington & Sutcliffe LLP
666 Fifth Avenue
New York, NY 10103
(212) 506-5000

Pantelis Michalopoulos
Mark F. Horning
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
(202) 429-3000

Counsel for Respondents

(3)

No. 09-355

Supreme Court, U.S.
FILED
DEC 8 - 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MARK TREESH, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE KENTUCKY DEPARTMENT OF REVENUE, AND FRANKFORT INDEPENDENT SCHOOL DISTRICT, FRANKFORT, KENTUCKY,

Petitioners,

v.

DIRECTV, INC., AND ECHOSTAR SATELLITE, L.L.C.,

Respondents.

On Petition For Writ Of Certiorari To The Kentucky Supreme Court

REPLY BRIEF

DOUGLAS M. DOWELL, SR.*
BETHANY G. ATKINS
OFFICE OF LEGAL SERVICES FOR REVENUE
FINANCE AND ADMINISTRATION CABINET
COMMONWEALTH OF KENTUCKY
P.O. Box 423
Frankfort, Kentucky 40602-0423
(502) 564-9581

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

ARGUMENT 3

I. THE KENTUCKY TAX IS ENACTED BY A STATE STATUTE AND THUS FALLS UNDER THE SAVINGS CLAUSE OF SECTION 602(c) 3

II. APPLYING KENTUCKY'S VIEW, THE SCHOOL TAX FALLS UNDER THE SAVINGS CLAUSE OF SECTION 602(c) 8

III. THIS CASE PRESENTS A QUESTION OF NATIONAL IMPORTANCE THAT NEEDS TO BE SETTLED NOW 10

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES:

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 6

Commonwealth v. Louisville National Bank, 220 Ky. 89, 294 S.W. 815 (1927) 9

CSX Transportation, Inc. v. Easterwood, 507 U.S. 658 (1993) 7

DeSylva v. Ballentine, 351 U.S. 570 (1956) 8

Florida Department of Revenue v. Picadilly Cafeterias, Inc., 128 S.Ct. 2326 (2008) 7

Griffin v. County Board of Prince Edward County, 377 U.S. 218 (1964) 6

Madden v. Kentucky, 309 U.S. 83 (1940) 2

Malone v. White Motor Corp., 435 U.S. 497 (1978) 7

Reconstruction Finance Corp. v. Beaver County, 328 U.S. 204 (1946) 5, 9

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 7

Rose v. Council for a Better Education, Inc., 790 S.W.2d 186 (Ky. 1989) 9

Roswell v. LaSalle National Bank, 450 U.S. 503 (1981) 8, 9

Salsburg v. Maryland, 346 U.S. 545 (1954) 6

Schwindel v. Mead County, Ky., 113 S.W.3d 159 (Ky. 2003) 9

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS, STATUTES, AND LEGISLATIVE HISTORY:

Ky. Const. Sect. 27 3

Ky. Const. Sect. 29 3

141 Cong. Rec. H8281-02, H8293 (Aug. 2, 1995), 1995 WL 458518 (Cong. Rec.) 4

142 Cong. Rec. H1145-06, H1158 (Feb. 1, 1996), 1996 WL 39800 (Cong. Rec.) 4

Telecommunications Act of 1996 §602, 47 U.S.C. § 152 note 2, 3, 5, 6, 8

Telecommunications Act of 1996 §602(a), 47 U.S.C. § 152 note 3, 7, 10

Telecommunications Act of 1996 §602(b), 47 U.S.C. § 152 note 8

Telecommunications Act of 1996 §602(c), 47 U.S.C. § 152 note ..... *passim*

Ky. Rev. Stat. Ann. § 131.030(1) 3

Ky. Rev. Stat. Ann. § 160.614 ..... 4, 5, 8

Ky. Rev. Stat. Ann. § 160.614(3) 3, 7

Ky. Rev. Stat. Ann. § 160.614(4) 3

Ky. Rev. Stat. Ann. § 160.615 3

Ky. Rev. Stat. Ann. § 160.6154 3

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITY:

NAT'L GOVERNOR'S ASSOC. AND NAT'L ASSOC. OF STATE BUDGET OFFICERS, THE FISCAL SURVEY OF STATES (DECEMBER 2009), *available at* http://nasbo.org 1

PRELIMINARY STATEMENT[1]

Not only is the issue presented by this case important to Kentucky, as the Respondents concede, because it represents "roughly $70 million in taxes, interest, and penalties[,]" Resp. Br. 11, but also it is one of national importance because virtually all other States are now struggling to find new sources of reliable and stable funding. Due to the current severe national recession, which began in December 2007, "States are currently facing one of the worst, if not the worst, fiscal periods since the Great Depression" NAT'L GOVERNOR'S ASSOC. AND NAT'L ASSOC. OF STATE BUDGET OFFICERS, THE FISCAL SURVEY OF STATES, EXECUTIVE SUMMARY (DECEMBER 2009), *available at* http://nasbo.org. "As state revenue collections historically lag behind any national economic recovery, state revenues will remain depressed throughout fiscal [year] 2010 and likely be sluggish into fiscal years 2011 and 2012." *Id.* "The weakening of state fiscal conditions is also reflected in the fact that states will have faced $256 billion in budget gaps between fiscal 2009 and fiscal 2011." *Id.*

The Respondents are admittedly national businesses, "serv[ing] 31 million households nationwide, including 500,000 in Kentucky." Resp. Br. 5. Therefore, the taxation of the Respondents and others offering like services (i.e., direct broadcast satellite

---

[1] The Respondents' Brief is cited as "Resp. Br.", the petition is cited as "Pet.", and the Appendix is cited as "App.".

("DBS") services), is of great importance to the States as it represents a broad-based source of substantial revenue, much like cable and other utility services.

Section 602 admittedly does not proscribe State taxation of DBS service. Only local taxation is forbidden. However, §602(c) makes it very clear that local taxing jurisdictions may receive revenue derived "from a tax or fee imposed and collected by a State." This case provides an ideal opportunity for illuminating the line between State taxation and local taxation. It is vital that States know where the line is drawn as they endeavor to meet their budgetary challenges and to "fit[ ] [their] tax programs to local needs and usages," *Madden v. Kentucky*, 309 U.S. 83, 88 (1940), as Kentucky has done here. It is likewise very important given the current budgetary environment that this line be clarified now, so that the States can know that whatever form of taxation they adopt in this area is a *reliable* source of revenue. Allowing this issue to "percolate" for the years it would take for a legal challenge to proceed in the courts would only prolong uncertainty in an area of great importance to the States.

Other points raised by the Respondents require a response.

ARGUMENT

I. THE KENTUCKY TAX IS ENACTED BY A STATE STATUTE AND THUS FALLS UNDER THE SAVINGS CLAUSE OF SECTION 602(c).

The Respondents mischaracterized the question presented by portraying the Kentucky School Tax as one of an "array of local taxes." The reality is that it is a *State* law enacted by the Kentucky General Assembly – the body in which Sections 27 and 29 of the Kentucky Constitution vests the legislative power of the Commonwealth of Kentucky, that requires the inclusion of the gross receipts derived from the furnishing of DBS service in the School Tax base. Ky. Rev. Stat. Ann. §160.614(3) and (4). Furthermore, it is the State statutory framework likewise enacted by the Kentucky General Assembly that provides for the tax to be centrally administered and collected by the Kentucky Department of Revenue. Ky. Rev. Stat. Ann. §§160.615; 160.6154; 131.030(1) ("The Department of Revenue shall exercise all administrative functions of the state in relation to the state revenue and tax laws . . . "). Thus, this framework contains all the indicia of a tax imposed and collected by the State and has none of the vices of the local taxation that was the object of §602(a) –a myriad of local ordinances varying in their language, requiring the filing of numerous and different tax returns, subject to various filing due dates, etc.

These administrative burdens were the objective of the preemption established by §602. This objective,

as expressed by Representative Hyde, was the elimination of the undue burden of "collecting and remitting local taxes and fees" to "thousands of local taxing jurisdictions[.]" 142 Cong. Rec. H1145-06, H1158 (Feb. 1, 1996), 1996 WL 39800 (Cong. Rec.); Pet. 15-16. Representative Hyde also stressed that Congress was mindful of the principle of federalism:

> In addition, we have also amended the local tax exemption for providers of [DBS] services to make it clear that States may tax such services and rebate that money to the localities. This change balances the need to protect State sovereignty against the need to protect the direct broadcast services from the administrative nightmare that would result from subjecting them to local taxation in numerous local jurisdictions.

141 Cong. Rec. H8281-02, H8293 (Aug. 2, 1995), 1995 WL 458518 (Cong. Rec.). This mischief Congress feared is not presented by Kentucky's School Tax.

As more particularly described in the Petition on pages three through seven, the School Tax is centrally collected and administered by the Kentucky Department of Revenue. Filing a single tax return, and remitting a single tax to the State of Kentucky in compliance with Ky. Rev. Stat. Ann. §160.614 does not interfere with the congressional policy objective to eliminate the burden on DBS providers of collecting and remitting taxes to "thousands of local taxing jurisdictions." The administrative nightmare presented by the differing ordinances of local jurisdictions is not

present here. The tax imposed by Ky. Rev. Stat. Ann. §160.614 does not require DBS providers to submit a multitude of different tax returns, subject to various filing due dates, as well as varying filing places that would be necessary when taxes are imposed and collected by local jurisdictions.

Furthermore, the School Tax at issue is no more burdensome than the imposition of any other State tax upon Respondents, as allowed by §602(c). Nothing in §602 restricts a State from requiring the submission of a tax according to certain boundaries or jurisdictions. Such a request would be perfectly reasonable to provide a means for the State to determine the distribution of the revenue collected, since §602(c) permits a State to distribute revenue derived from a tax on DBS providers to local jurisdictions.

The Kentucky School Tax is no different from any other State tax enacted by the Kentucky General Assembly. The Respondents and the Kentucky Supreme Court focus on the fact that school districts could opt out of the School Tax prior to the date the enactment became effective and that school districts may choose different rates to be applied to the gross receipts subject to the tax.

There is nothing in §602 that requires the tax imposed by the State to apply uniformly throughout the State. States have diverse methods of assessment, collection, and refunding. *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204, 209 (1946). Tax rates vary widely. *Id.* If Congress intended uniform

taxation among the States or only to spare from preemption a tax applied uniformly in each State, it would have said as much in §602(c), as it has done in other statutes. *Id.* ("Congress, had it desired complete nationwide uniformity as to tax consequences, could have stipulated for fixed payments in lieu of taxes, as it has done in other statutes.").

Furthermore, nothing in §602 requires a State-imposed tax to be uniform in its application Statewide. Nor is this a requirement under federal law. *Griffin v. County Board of Prince Edward County*, 377 U.S. 218, 231 (1964) ("A State, of course, has a wide discretion in deciding whether laws shall operate statewide or shall operate only in certain counties, the legislature 'having in mind the needs and desires of each.'" (quoting *Salsburg v. Maryland*, 346 U.S. 545, 552 (1954))).

Section 602(c) plainly allows local jurisdictions to receive revenue from a State-imposed tax. The variance of the rates and opt-out provision is simply a mechanism by which school districts (assuming they are local taxing jurisdictions) share in the revenue of the tax established by the State. Congress did not intend uniform taxation among the States, or a uniform application Statewide because it would have said as much if it did.

What Congress meant by "imposed . . . by a State" in §602(c) must be determined in conformity with the expressed legislative policy. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) ("'[T]he

purpose of Congress is the ultimate touchstone of pre-emption analysis.'" (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)). Whereas here, the federal act pertains to a subject traditionally occupied and governed by state law, "pre-emption will not lie unless it is 'the clear and manifest purpose of Congress.'" *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 663-664 (1993) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

In light of the principle that preemption is not to be presumed and indeed strictly construed, the Kentucky Court has given §602(a) a construction that goes well beyond its narrow purpose, which certainly was not to relieve the Respondents of taxation to support the States in which they do business. To the extent the ordinary meaning of "impose" presents a latent ambiguity, the overriding federalism canon articulated in *Florida Department of Revenue v. Picadilly Cafeterias, Inc.*, 128 S.Ct. 2326 (2008) on page 2337 that "courts should proceed carefully when asked to recognize an exemption from taxation that Congress has not clearly expressed[,]" requires §602(a)'s exemption from taxation to be construed narrowly, not the sweeping application announced by the Kentucky Supreme Court. Application of this canon to the congressional language results in a finding that "the 'savings clause' in subsection (c) in §602 contemplates a school tax scenario as prescribed in K[y.] R[ev.] S[tat.] [Ann.] 160.614(3)." App., 26. Kentucky's School Tax is imposed by the State and collected by the State and the revenue produced is shared with the school districts. Any way you look at

it, the administrative burdens that were the object of §602 are not present.

Moreover, the broad application of exemption from taxation urged upon this Court by the Respondents that would preempt Ky. Rev. Stat. Ann. §160.614 runs afoul of Congress's express recognition of the principle of federalism by interfering with Kentucky's ability to tailor its taxing laws to meet its needs. "[T]he imperative need of a State to administer its own fiscal operations," *Roswell v. LaSalle National Bank*, 450 U.S. 503, 522 (1981), raises an important question of comity under the principles of federalism clearly contemplated by Congress when it enacted §602.

II. APPLYING KENTUCKY'S VIEW, THE SCHOOL TAX FALLS UNDER THE SAVINGS CLAUSE OF SECTION 602(c).

The Respondents' contention that a Kentucky school district is a local taxing jurisdiction, Resp. Br. i, 13, cannot be assumed since Congress did not include a school district in its definition of "local taxing jurisdiction" in §602(b). "The scope of a federal right, is of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law[,] . . . especially where a statute deals with . . . [what is] primarily a matter of state concern." *DeSylva v. Ballentine*, 351 U.S. 570, 580 (1956). The ability of a State to raise revenue through taxation is an important matter of State

concern. *See e.g. Roswell v. LaSalle National Bank*, 450 U.S. at 522.

Likewise, this Court has found that Congress intended a State-law definition of a statutory term where uniformity clearly was not intended. *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. at 209-210. In light of the express provision in §602(c) permitting taxation of any form by a State, "the assumption that Congress intends to have its law to have the same consequences throughout the nation cannot be made." *Id.* at 209. Congress clearly expressed its intent not to free DBS providers from taxation or to impose uniform tax consequences in each State by the savings clause of §602(c).

Kentucky courts agree that public education is a vital function of State government, and that a school district board of education is not a local government, but an agency of State government. *Schwindel v. Meade Co., Kentucky*, 113 S.W.3d 159, 168 (Ky. 2003). School taxes are classified as State, not local taxes. *Commonwealth v. Louisville National Bank*, 220 Ky. 89, 294 S.W.815, 817 (1927). As noted by the Kentucky Court of Appeals, "the *sole responsibility* for providing a system of common schools lies with the General Assembly." App., 20 (quoting *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186, 216 (Ky. 1989)). Therefore, applying Kentucky's view, the School Tax falls under the savings clause of §602(c) because it is a tax imposed and collected by the State that does not offend the federal objective of relieving

DBS providers of the administrative burdens that come with local taxation.

III. THIS CASE PRESENTS A QUESTION OF NATIONAL IMPORTANCE THAT NEEDS TO BE SETTLED NOW.

The Respondents' assertion that because twenty-nine states have enacted legislation that imposes some form of State tax on DBS providers makes this case of no importance is mistaken; rather, it signifies the opposite conclusion. Resp. Br. 1, 11. Twenty-three other States, or almost half, have yet to broaden their State taxes to include DBS providers.

Furthermore, the States' mechanisms used to fund their public schools, as more particularly described on pages twenty-three through thirty-two of the Petition, is a classic example illustrating the kind of traditional State concern that buttresses a narrow interpretation of the exemption from taxation allowed by §602(a). Kentucky has placed itself at the forefront of education reform. It matters not whether this is because Kentucky is "one of the poorest states in the nation," as the Respondents suggest, Resp. Br. 9, or instead, notwithstanding that it is poor. Kentucky's efforts to strengthen its education funding system by making it more balanced, stable, efficient, and fair is tailored to foster "the vital element of local participation" that this Court and every other State recognizes is not only vital for continued public

support of schools, but also of overriding importance from an educational standpoint. Pet. 24-26.

The Kentucky Supreme Court's Opinion creates uncertainty as to the limitations Congress has placed upon the States' taxing powers at a time of an historical economic recession when States cannot afford to wait on the lengthy process required when a law is challenged. Therefore this question of national importance needs to be settled now.

CONCLUSION

For the foregoing reasons and those stated previously, the petition for writ of certiorari should be granted.

Respectfully submitted,

DOUGLAS M. DOWELL, SR.
Counsel of Record
BETHANY G. ATKINS
OFFICE OF LEGAL SERVICES FOR REVENUE
FINANCE AND ADMINISTRATION CABINET
COMMONWEALTH OF KENTUCKY
P.O. Box 423
Frankfort, KY 40602-0423
(502) 564-9581

Counsel for Petitioners